Supreme Court, U.S.
FILED

03 794 SEP 22 2003

In the

Supreme Court of the United States

Nancy Mitchell

Petitioner,

v.

Gregory Shain D.D.S.

Respondent.

On Petition For Writ of Certiorari To
The Court of Appeal, State of California

Petition for Writ of Certiorari

Nancy Mitchell, in pro per
8840 Villa La Jolla Drive #214
La Jolla, Ca. 92037
phone (858) 271-2414

QUESTIONS PRESENTED FOR REVIEW:

A.

1) Is it a violation depriving me of my fundamental liberty rights and due process under the 14th Amendment of the U.S. Constitution for a judge to exceed her jurisdiction and ignore well established public policy statutes regulating dental health care and required licensing, then to re-write a new exemption in direct conflict with the statutes "allowing an unlicensed person to practice as a RDA " who let her license expire years ago, essentially rendering state licensing and public safety statutes invalid?

2) If this ruling stands and is prejudicially only applied to my case, isn't this discrimination by not enforcing statutes protect-ing the public's health and safety when I am part of the public; and if the statutes are not enforced to protect the public, aren't the statutes themselves misleading?

3) Further, were my constitutional liberty rights violated by Dr. Shain not informing me prior to treatment the assistant was not licensed or qualified to perform work he delegated to her which required a valid license by the state, to allow me to make an informed decision if I wanted to decline the unwanted treatment?

4) Has a judge exceeded her jurisdiction to then exclude negligence and informed consent jury instructions for jurors to try this major issue of my case when sufficient testimony and evidence was presented in all the pleadings and at trial?

B.

Is it a violation of my 1st amendment rights abridging the freedom of speech, my liberty rights, and due process, for a judge to exceed her jurisdiction and prejudicially *not allow me to impeach, nor refute,* damaging false testimony and false material evidence the defendant presented, when

refuting the evidence did not require an expert, resulting in preventing jurors from weighing important facts and the defendant's trustworthiness, prejudicially causing jurors to rely upon defense lies left unchallenged per the judge's ruling, and left me no defense? Under the circumstances, was instructing jurors with Baji' 6.30, 2.04 & 2.02 in error?

C.

Is it a violation of the U.S. Constitution depriving me of my fundamental liberty rights, due process, & equal protection of the laws under the 14th Amendment of the U.S. Constitution; for a judge, in a jury trial, to weigh the evidence herself given on main theories of my case and then refuse giving four jury instructions on these main theories presented which don't require expert testimony when the judge ruled they all did, excluding jurors from trying the case, and from knowing the statutes setting the standard of care which were understandable to the layman, for jurors to determine according to law what the dentist's duty was and weigh if the dentist was negligent according to the statutes?

D.

1) If jurors are told to base their decisions upon the records and evidence presented, but dentists are allowed to get rid of any incriminating evidence to the defendant dentist contained in the records through summarization laws, aren't summarization laws unconstitutional depriving an injured party access to their complete records, and depriving jurors from weighing all the relevant facts in the case while giving dentists a way to alter the records in the dentist's and insurance company's favor from the onset? If 8 -9 dentists lost all or portions of my records, or altered them through summarization laws, when suppression of evidence is made legal through summarization, are summarization laws in

conflict with spoilation, equal protection rights, and the Ins. Act?

2) If Congress changes laws, which I lobbied for reform of prior to trial and during my appeal, now "allowing" a patient the rights to access their own records fully so records can only be summarized now "if "the patient agrees to a summarization in advance, and erroneous records can now be challenged, am I deprived of my liberty rights by ruling and enforcing extinct laws enabling spoilation which should have been unenforceable?

E.

1) If my attorney grossly misrepresents me in my dental malpractice case by missing time lines for submitting most of the significant evidence proving my case, and conceals this until after my reply brief is filed; doesn't research laws, misrepresents facts, lies, switches documents on the judge in collusion with the defense attorney, prevents my expert's planned return, and with holds evidence, losing the case while blaming the judge and the defense attorney; and after late discovery of this the Appellate Court cuts me off in oral argument before I could finish telling them what happened, then denies a rehearing with the facts pre-sented; have I been denied my constitutional liberty rights under the 14th amendment denying me the dentist's insurance compensation for lifetime medical treatment for the injuries the dentist caused while inflicting double jeopardy on me of malpractice by my own attorney? If the only recourse is to sue my attorney, taking more years of my life while disabled, he refused to file a claim with his insurance, and **he has no assets**, how can the law justify my suing him as a viable remedy for losing a meritorious case?

2) If the trial judge was aware of the attorney's gross

errors but concealed it from me making many rulings in side bars with just the attorneys present, without recording 12 minutes of them, and later recused herself preventing my discovery of acts and rulings, aren't these acts unconstitutional against my liberty rights?

PARTIES, PARENT COMPANIES, AND SUBSIDIES

In compliance with U.S. Supreme Court Rule 14(b), Petitioner represents to the Honorable Court that the parties to this Petition are named in the caption of this case, plus the defendant's unlicensed assistant, Denise Sacrenty. To the knowledge of the Petitioner, Gregory(Greg) Shain was represented as "Gregory Shain D.D.S." by his malpractice insurance company and their attorneys from the law firm of Neil, Dymott, Perkins, Brown, and Frank. His other Doe was Gregory Shain BDS, Inc.

TABLE OF CONTENTS

Questions presented		Pg i
Parties, parent companies, and subsidiaries		Pg iv
Table of Authorities		
Cases		Pg vi
Other Authorities		Pg ix
Appendix, Table of Contents		Pg xi
Reference to Reports of Opinions & Concise Statement of Grounds for Jurisdiction		Pg 1
Statement of the Case		Pg 4
Course of Proceedings & Disposition in the Courts Below.		Pg 7
Statement of Facts: Argument of Why Certiorari Should Issue		Pg 9
Argument to Question A (1)(2)(3)(4)		Pg 10
Argument to Question B		Pg 18
Argument to Question C		Pg 21
Argument to Question D		Pg 25
Argument to Question E	(Per Rule 33 (1)(d))	Pg 27
Conclusion	(Per Rule 33 (1)(d))	Pg 30
Appendix		App.1-107

TABLE OF AUTHORITES:

CASES:

Marblehead Land Co. V. Superior Court (1923) 60 Cal.App. 644, 213 P. 718. Pg 3

Cedar Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, 17-18, Pg 8

California Teachers Ass'n v. State Bd. Of Education 271 F.3d 1141 (9th Cir 2001) "(2) Constitutional Law key 148(8) & 17.statutes key 47 Pg 10

Alferitz v. Borgwardt (1899)126 C. 201, 207, 58 P.460 & (126 C.1208) Pg 10

Daum v. Spine Care Medical Group, Inc. (1997) 52 Cal.App.4th 1285, 1306, 1318. Pg 11

Brooks v Wilson 98 Ohio App.3d 301, 307, 648 N.E.2d 552, 553, 556(Oh.Ct.App. 1994 Pg 15

US Sup. Ct. Digest US Mo. 1990 in Cruzan by Cruzan v. Director, Missouri Dept. Of Health 110 S. Ct. 2841, 497 U.S. 261, 111.L.Ed.2d 224, 229 "Constitutional Law Section 528.5 Pg 15

City of Pasadena v. AT & T Communications of California, Inc 127 Cal.Rptr.2d 276, 278,& 279 Pg 16

California Jurisprudence 3D 2003 Cumulative Supplement of Constitutional Law section 138: U.S. Constitution Article 6 cl. 2. PTI, Inc. v. Phillip Morris Inc., 100 F.Supp. 2d 1179 (C.D.Cal. 2000) Pg 16

U.S. V. LaPage 231 F.3d 488, 491 (1,2) (9th Cir. 2000) Pg 18

U.S. v. LaPage 231 F.3d 488, 491 (1,2) (9th Cir. 2000) Pg 21

Ng v. Hudson (1977) 75 Cal. App. 3d 250, 261, 262; Phillips v. G. L. Truman Excavation Co.,

supra, 55 Cal.2d 801, 808 Pg 21
Hale v. Venutto (1982) 137 Cal.App.910, 915 Pg 22
Ng v. Hudson (1977) 75 Cal. App. 3d 250, 261, 262 Pg 22
Galvez v Frields (2001)88 Cal.App.4th 1410, 1423 Pg 23
Gannon v. Elliot(1993) 19 Cal.App.4th 1-3, 8-10 Pg 23
US Supreme Court Reports, Giaccio v. Pennsylvania 382 US 399 page 450 (4,5); 15 L. Ed 2d 447, 86 S Ct 51 Pg 24
382 US 403 Pg 24
Lanzetta v New Jersey 306 US 451 Pg 24
Stahlin v. Hilton Hotels Corporation 484 F.2d 580,581, 585 (1973) pg 581 note 9 Pg 24
Burkhart v. Randles 764 F.2d 1196, 1199 Pg 24
Haislah v. Walton, 676 F.2d 208, 212 (6th Cir.1982) Pg 24
McGee v Cessna Aircraft Co. (1978) 82 Cal.App. 3d 1005, 1019 Pg 24
Grudt v. City of Los Angeles (1970) 2 C.3d 575, 588 Pg 24
People V. Cameron (1975) 53 C.A.3d 786, 789 Pg 24
People V. Cameron (1975) 53 C.A.3d 786 headnote 2, Constitutional Law section 20 Pg 24
Burrows v. State (1968) 260 CA2d 29, 33, 66 CR 868 Pg 25
Conservatorship of Delay (1988, 4th Dist.) 199 Cal.App.3d 1031, 245 Cal.Rptr. 216, Pg 25
People V. Cameron (1975) 53 C.A.3d 786, 789 Pg 25
Civ. Serv. Employees Ins. Co. V. Sup. Ct. (1978) 22 C3d 362, 374 n6, 149 CR 360 Pg 25
California Pools, Inc. V. Pazargad (1982) 131 CA3d 601, 182 CR 568 Pg 25

Morrison v State Bd. Of Educ. Supra Pg 25
Ward v. Taggart (1959) 51 C2d 736 Pg 25
Powell v. Premier Ins. Co (1981) 118 CA3d 336, 345, 173 CR 383. Pg 25
Monterey Club v. Sup. Ct. (1941) 48 CA2d 131, 119 P2d 349 Pg 25
Burrows v. State (1968) 260 CA2d 29, 33, 66 CR 868 Pg 25
Conservatorship of Delay (1988, 4th Dist.) 199 Cal.App. 3d 1031, 245 Cal.Rptr. 216 Pg 25
Di Sabatino v. State Bar (1980) 27 C3d 159, 162 Cal Rptr 458, 606 P2d 765 Pg 26
Board of Commrs. V. Younger (1865) 29 C. 147 Pg 30
United States Trust Co. V. New Jersey 431 US 1, 26; 52 L Ed 2d 92, 97 S. Ct 1505 Pg 30
U.S. v La Page 231 F.3d 488, 491(1,2), 492(6,7) Pg 30

OTHER AUTHORITIES:

Rule 14 (b)	Pg -iv-
Rule 14 (I)-(vi)	Pg -xi-
Rule 14(1)(i)(vi)	Pg 1
Rule 10 (b), 10 (c)	Pg 2
Statutes, Laws, & Cases	Pg 2-3
Rule 29(4)(c)& (b); Rule 14(e); &28 U.S.C. § 2403(b)& (a)	Pg 3
13 Cal Jur 3d (Rev) Part 1 §50.	Pg 3
12 Cal Jur 3d (Rev) §54	Pg 3
13 Ca. Jur. 3d (Rev) Part 1 page 107 § 51	Pg 10
California Procedure 4th Edition Vol 9 §955,956	Pg 10
California Code of Regulations, Dental Practices Act, Business and Professions Code, Chapter 4, Consumer Affairs § 301, Legislative Intent	Pg 12
California Code of Regulations, Dental Practices Act, Business and Professions Code§145(a)(b)	Pg 12
Dental Practices Act, Business and Professions Code, Article 2, § 1626	Pg 12
Dental Practices Act, Business and Professions Code, Article 2, § 1625(b)(c)	Pg 12
Dental Practices Act, Business and Professions Code § 1680 (c) (y)(cc)(ee)	Pg 12
Dental Practices Act, Business and Professions Code, Title 16, Article 5,§1085 (a)(3)(7)	Pg 12
California Code of Regulations, Dental Practices Act, Business and Professions Code §1764	Pg 12
Dental Practices Act, Business and Professions Code section 1017(a)(3)	Pg 13
Code of Civil Procedure § 1858	Pg 16
Code of Civil Procedure § 1859	Pg 16
13 Cal Jur 3d (Rev) Part 1 § 145	Pg 16

Baji 6.30 & 6.02	Pg 17
36 Cal Jur 3d (Rev) Part 1 § 52	Pg 18
Baji 6.30, 6.06, 2.40, 2.04	Pg 19
Baji 2.02, 6.06, 6.11	Pg 20
1st and 14th Amendments of the U.S. Constitution	Pg 21
Baji 6.11, 6.35, 6.36, 6.06	Pg 21
Baji 6.30	Pg 22
Baji 15.22, 6.00.1	Pg 23
Evidence Code 669(a)(1)	Pg 23
13 Cal Jur 3d (Rev)Part 1 § 57 of constitutional law	Pg 24
Cal.Jur.3d, Constitutional Law §61; Am.Jur.2d, Constitutional Law §115	Pg 24
13 Cal Jur 3d (Rev) Part 1§57	Pg 24
California Civil Writ Practice § 318(b)	Pg 24
California Civil Appellate Practice § 5.44	Pg 24
Baji 2.03	Pg 25
Insurance Act § 1871.4(a)	Pg 26
Dental Practices Act, Health and safety Code §1795.20 (a)	Pg 26
Insurance Code § 1871.4(a)(1)(2)	Pg 26
Business & Professions Code 6068 (d)	Pg 26
§ 1871.4(a) of the Insurance Code	Pg 26
California Procedure 4th Edition Vol 9§956	Pg 27
Health Insurance Portability and Accountability Act (HIPAA) 45.CFR sections 164.524(a)(1); 164.524(c)(2)(i); 164.524(c)(2)(ii)(A); 164.526(a)(1); 164.528(a)(1);164.530(j)(2)	Pg 27
Baji 2.03	Pg 27
1st and 14th Amendments of the U.S. Constitution	Pg 30

APPENDIX

(In compliance with U.S. Supreme Court Rule14(i)-(vi): opinions, orders, findings of fact, conclusions of law with the judgement to be reviewed; of companion cases; rehearing; judgments; laws; (vi) and any other material the petitioner believes essential to understand the petition.) Appendix documents listed in the petition as: i.e. (A1-pg4) are located in the back of the petition.)

TABLE OF CONTENTS No.	Appendix Page App.
1. Court of Appeal, Unpublished Opinion, Appeal denied. Filed 4/7/03. (18 pages)	1-18
2. Court of Appeal, Rehearing, denied. Filed 5/1/03.	19
3. Supreme Court of California. Review, denied. Filed 6/25/03.	20
4. Court of Appeal, Remittitur issued 7/1/03. Decision is final.	21
5. Court of Appeal, Request for additional time for oral argument, denied. Filed 2/11/03	22
6. Court of Appeal, notice of insufficient response to court order by Brown in providing remaining exhibits from trial. Dated 10/15/01.	23
7. *California Code of Regulations, Dental Practices Act, Business and Professions Code, Chapter 4, Consumer Affairs section 301, Legislative Intent	24
8. *California Code of Regulations, Dental	

	App.
Practices Act, Business and Professions Code section 145(a)(b)	24
9. In the Dental Practices Act, Business and Professions Code, Article 2, section 1626	24
10. Dental Practices Act, Business and Professions Code, Article 2, section 1625(b)	25
11. Dental Practices Act, Business and Professions Code section 1680 (c) (y)(cc)(ee)	25
12. Dental Practices Act, Business and Professions Code, Title 16, Article 5, section 1085 (a)(3)(7)	25
13. California Code of Regulations, Dental Practices Act, Business and Professions Code 1764	26
14. California Code of Regulations, Dental Practices Act, Chapter 4, Continuing Education, section 1017(a)(3)	26
15. Health Insurance Portability and Accountability Act (HIPAA), 45.CFR, §164.524(a)(1), 164.524(c)(2)(i), § 164.524(c)(2)(ii)(A), § 164.526(a)(1), § 164.528 (a)(1) , § 164.530(j)(2)	27
16. Dental Practices Act, Health and Safety Code § 1795.20 (a)	28
17. Insurance Code § 1871.4(a)(1)	28
18. California Procedure 4th Edition Vol 9 § 956	29
19. Baji 2.02, 2.03, 2.04	29
20. Baji 2.40, 6.00.1	30
21. Baji 6.02, 6.06, informed consent 6.11	31
22. Baji 6.30, 6.35	33

	App.
23. Baji 6.36	35
24. California Teachers Ass'n v. State Bd. Of Education(9th Cir 2001); Alferitz v. Borgwardt	35
25. Daum v. Spine Care Medical Group, Inc. (1997); US Sup. Ct. Digest US Mo. 1990 in Cruzan by Cruzan v. Director, Missouri Dept. Of Health; City of Pasadena v. AT & T Communications of California, Inc	36
26. California Jurisprudence 3D 2003 Cumulative Supplement of Constitutional Law section 138:U.S. Constitution Article 6 cl. 2. PTI, Inc. v. Phillip Morris Inc.; Code of Civil Procedure §1858; Code of Civil Procedure section 1859	37
27. U.S. V. LaPage(9th Cir. 2000); Ng v. Hudson (1977); Phillips v. G. L. Truman Excavation Co.	38
28. US Supreme Court Reports, Giaccio v. Pennsylvania; 382 US 403; Lanzetta v New Jersey; Stahlin v. Hilton Hotels Corporation	39
29. Burkhart v. Randles quoting Haislah v. Walton; McGee v Cessna Aircraft Co. (1978); People V. Cameron; Cal.Jur.3d, Constitutional Law section 61;Am.Jur.2d, Constitutional Law §115; Burrows v. State; Conservatorship of Delay; Civ. Serv. Employees Ins. Co. V. Sup. Ct.; California Pools, Inc. V. Pazargad; Morrison v State Bd. Of Educ. Supra; Ward v. Taggart; Powell v. Premier Ins. Co; Monterey Club v. Sup. Ct..	40
30. Di Sabatino v. State Bar (1980) 27 C3d 159, 162 Cal Rptr 458, 606 P2d 765; & Bus. & Prof. Code 6068 (d); 1st Amendment to the	

App.

Constitution; 14th Amendment to the Constitution; Board of Commrs. V. Younger 41

31. Brooks v. Wilson 42

32. Trial minutes of 2/8/01, side bar during Shain's testimony in court with court and counsel, 4 minutes, not reported. (CRP588)(of 12 missing mins.) 42

33. Kaplan's letter to Miklusak dated 1/16/01, listing additional witnesses and evidence. 44

34. Brown's letter to Kaplan dated 1/18/01 objecting to Kaplan's letter of 1/16/01. 47

35. Brown's letter to Kaplan dated 1/24/01 stating Mitchell's deposition changes were late. 48

36. Brown's letter to Kaplan dated 1/24/01 stating Dr. Sperber's deposition changes were late because Kaplan missed his 30 day stipulation. 49

37. Plaintiff's opposition to motion in limine #1, filed 1/23/01, (6 pgs including Sperber's 4 pg errata, including pg95 stating #30 was rendered non-anatomic from over grinding, and offer to be re-deposed.) (CRp536-541) 51-57

38. Plaintiff's opposition to motion in limine #2, filed 1/23/01, (4 pages including Sacrenty's license expiration of 2/28/85in a letter from Consumer Affairs dated 5/11/99, exhibit 11 submitted at Shain's deposition on 9/27/00) (CRp543-546) 58-62

39. Letter from Consumer Affairs dated 5/10/02confirming Sacrenty's RDA license expired on 2/28/85and "an expired license is invalid in California". A new RDA license was

App.
issued on 10/2/00. 63
40. Gregory Shain's deposition pages 67-69 taken 10/27/00 admitting he knew Sacrenty's license expired 13 years ago in 1985, Brown attended the deposition. (CRp948) 65–67
41. Deposition of expert Norman D. Sperber dated 11/2/00 page 50; confirming he reviewed Olmstead's photocopied x-rays, exhibit 22, dated 10/22/98 with notes on them of #30 flattened. (CRP911) 68
42. Portions of Dr. Coffey's deposition testimony on 11/13/00, pg 21-22 taken after Sperber's depo, blaming Shain for altering my bite causing my TMJ, related to my picketing; & a TMJ study, pg 18-19 69-72
43. Expert, Dr. Sperber's, initial signed declaration of Shain's malpractice dated 7/18/00 including Sacrenty's inappropriate acts, requested by jurors but not allowed into evidence. 73
44. Expert Dr. Sperber's 2 paged letter to the CASupreme Court dated 5/21/03 requesting a review and a new trial granted. 74-76
45. Copy of one side of the 4 sided flyer handed out when I protested in May/June of 2000 related to reforming dental laws & summarizations. (Lodged with the court of appeal exhibit #G48) 77-78
46. Attorney Steven J. Freeburg's declaration ofMichael A. Kaplan's malpractice in my case againstShain. (2 pgs) 79-81
47. Kaplan's fax to Brown dated 2/12/01 thanking Brown for putting together the Baji's. 82

App.

48. Kaplan's fax to Brown dated 2/17/01, during deliberations while anticipating a mistrial order, offering Dr. Sperber to be re-deposed on issues not addressed at Sperber's original deposition, including Sacrenty's unlicensed status and Shain's drug use, as only procedural violations were testified to at his deposition. 83

49. Declaration of Michael Kaplan in support of motion for new trial dated 3/11/01, blaming the judge for Sperber not being allowed to return. (3 pgs) (CRp695-697) 84-86

50. Declaration of Dr. Kohani dated 1/7/03 stating he released my x-rays twice to Knox Photo Services, used by Brown, and they were never returned to him. 87-88

51. Declaration of Debbie Beymer dated 5/17/00 stating unlicensed Sacrenty drilled in her mouth adjusting her crown unsupervised, too. (CRp352) 89

52. Letter from the Dental Board of California deciding Shain's work was a departure from the normal standard of care, including poor work, and Sacrenty working without a valid license. Dated 5/2/01. They did not address TMJ at all. (CRp908) 90-91

EXCERPTS FROM THE TRIAL TRANSCRIPTS

53. CTp17, 18, 42 92

54. CTp43, 44, 48, 49, 59 93

55. CTp51, 52 94

56. CTp53 95

57. CTp54, 55 96

58. CTp56, 57, 58 97

		App.
59.	CTp59, 60	98
60.	CTp142	99
61.	CTp143, 189, 196	100
62.	CTp197, 198	101
63.	CTp369, 496, 497, 499	102
64.	CTp*1085, 583, 584, 585	103
65.	CTp601, 612, 613	104
66.	CTp869, 943, 971	105
67.	CTp972, 973	106-107

*I would like to reserve the right to later submit post trial juror declarations corroborating events not recorded, copies of Shain's false photographs to compare to photos of my real teeth, my 3rd amended complaint against Michael A. Kaplan and attachments. Most were previously filed with the court or lodged.

Supreme Court of the United States
No. _____

Nancy Mitchell, petitioner

v.

Gregory Shain D.D.S.

Petition for a Writ of Certiorari to the Supreme Court of the United States

REFERENCE TO REPORTS OF OPINION; CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

(*Note: Addresses of cases are in the Table of Authorities.) (Reference to Appendix = (App.1).) (**CTp** starts on **App.92**)

In compliance with the U.S. Supreme Court Rule 14(e): The Court of Appeal, Fourth Appellate District, Division One, State of California denied my appeal on April 7, 2003 in an unpublished opinion. The Petition for Rehearing was denied on May 1, 2003. The California Supreme Court denied a Petition for Review on June 25, 2003 (**App.20**). I'm requesting the unpublished opinion of the Appellate Court & subsequent rulings are reviewed by the US Supreme Court.

In compliance with U.S. Supreme Court Rule 13(1), this petition for a writ of certiorari is filed timely within 90 days after entry of the order of the California Supreme Court denying discretionary review. The judgement is final. All parties have been served. I know of no other remedies available. A Remittitur was issued on July 1, 2003. All these documents are in the appendix (**App. 1-21**), plus documents essential for understanding, per Rule 14(1)(i)(vi)(**App.22-107**)

I have only one business law class behind me. I could *not afford an attorney* and was **forced** into representing myself as there is **no alternative help available** for a person with limited financial resources appealing a dental malpractice case. In most every area of law, except dental and medical malpractice, alternative help is available. Others have stated I should be held to the same standard as an attorney

which is unconstitutional opposing the 14th amendment's equal protection clause. I do not have the education, skill, and training of an attorney. (Please apply the correct writ.)

Rule 10(b) of the Rules of the Supreme Court of the United States provides for a review by the Supreme Court of the U.S. when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a U.S. court of appeals. Rule 10(c) provides for review when a state court or a U.S. Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court.

This case involves questions with those standards. I believe the courts have so far departed from accepted public policy to call for this Court's supervisory power. The issues involve 1st and 14th Amendment rights of constitutional liberty rights; equal protection; due process; freedom of speech; federal constitutionality of statutes in health care and enforcement issues; judicial re-writing of statutes; denial of jury instructions; the right to deny unwanted treatment; denied impeachment rights; misrepresentations of ineffective counsel; contempt; extrinsic & insurance fraud. Rulings are in conflict with: state and federal statutes, constitutions, and rulings; and public policy issues involving the health and safety of everyone. In 8/02 laws were changed federally through **HIPAA**. impacting this case. (App.24-29), 45 CFR § 164.524 (a)(1), 164.524(c)(2)(i), 164.524(c)(2)(ii)(A), 164.526(a)(1), 164.528 (a)(1), 164.530(j)(2)); (**&** See Cal. Code of Regulations Dental Practices Act, Business & Professions Code (App.24-26,28-29): **1)** Chapter 4 Consumer Affairs 2§ 301 legislative intent; **2) §** 145(a)(b); **3)** Article 2 § 1626; **4)** Article 2 § 1625(b); **5)§**1680 (c)(y)(cc)(ee); **6)** Title 16 article 5 §3 1085(a)(3)(7); **7) §** 1764; **8)** Chapter 4 § 1017(a)(3); **9)**

Health & Safety Code 1795.20(a); **10)** Insurance Code § 1871.4(a)(1); **11)** California Procedure § 956; **12)** 1st and 14th Amendments to the Constitution(App.41); **13)** Bus. & Prof. Code 6068(d)(App.41); **14)** CCP 1858-1859 (App.37); **15)** Baji's (App.29-35)2.02, 2.03, 2.04, 2.40, 6.00.1, 6.02, 6.06, 6.11, 6.30, 6.35, 6.36; **16)** Cal. Jur.3d, Constitutional Law § 61;Am.Jur.2d, Constitutional Law§115(App.40); **17)** & cases (**App.35-42**):California Teachers Ass'n v. State Bd. of Education, Alferitz v. Borgwardt, Daum v. Spinecare Medical Group, City of Pasadena v. AT & T Communications of California, U.S. v. LaPage, Ng v. Hudson, US Supreme Ct. Reports, Giaccio v. Pennsylvania, Stahlin v. Hilton Hotels Corp, Burkhart v. Randles and Haislah v. Walton, McGee v Cessna Aircraft Co., People v. Cameron, Burrows v. State, Conservatorship of Delay, Civ. Serv. Employees Ins. V. Sup. Ct.; California Pools, Inc. V. Pazargad;Morrison v State Bd. Of Educ. Supra; Ward v. Taggart; Powell v. Premier Ins.; Monterey Club v. Sup. Ct., Di Sabatino v. State Bar, Brooks v. Wilson, & US Sup. Ct. Digest US Mo. 1990 in Cruzan by Cruzan v. Director, Mo. Dept. Of Health - Constitutional Law § 528.5.

In compliance with U.S. Supreme Court Rule 29(4)(c) & (b), 28 U.S.C. §5 2403(b) & (a) may apply. Per U.S. Supreme Court Rule 29(4)(c) and Rule 14(e): I am unaware if the court pursuant to 28 U.S.C. § 2403(b) certified to the State Attorney General the constitutionality of statutes of this State were questioned. The lower courts denied review of constitutional issues not originally argued in the trial court, *without considering exceptions*. The Court of Appeal addressed and advanced challenges of federal/constitutional questions in their opinions (**App. 4-17**), as a foundation for this writ application per 13 Cal Jur 3d (Rev) Part 1§50.

Per 12 Cal Jur 3d (Rev) § 54: I request with this certiorari petition all persons acting under the order or judgement of the inferior tribunals to desist from further proceedings in the matter to be reviewed, pending the decision of the U.S. Supreme Court. Marblehead Land Co. V. Superior Court.

STATEMENT OF THE CASE

This is a dental malpractice case resulting in the delegation of three crowns being fabricated, placed, repeatedly adjusted improperly, leaving them high, by an unlicensed dental assistant, (Denise Sacrenty) which is illegal (**App. 5-6, 8-13,17, 24-26, 44-50, 62-71, 73-76, 79-81, 83-86,89-91;** brief 4-28 & 37, reply brief 3,6,7,10, 17, 25-27, 31, 41-42; rehear-ing 25-26; CTP 12-19, 48-50, 54-60, 269, 536, 541-542, 601-602, 610-613, 756, 869, 972-973). The treatment resulted in poor work needing replacement and permanent TMJ/TMD damage. I was treated in 1998 and was not informed prior to treatment the assistant was not licensed, and **hadn't been licensed for 13 years**, to be able to assess the risks involved and decline the unwanted treatment. The crowns were ill fitting, over sized, lopsided, and improperly adjusted; first by the dentist. The occlusion adjustments were finished up by the unlicensed assistant, along with adjusting a new filling, by her using a drill in my mouth. The dentist never returned to check Sacrenty's work, evidenced by leaving a retraction cord under crown #30. The release form was signed on the way out, after the treatment. Jaw pain began and more adjustments were subsequently made on several return visits. Pain medication was prescribed but not recorded. My occlusion was left high and lopsided repeatedly with both the temporary and permanent crowns, requiring multiple subsequent adjustments. My bite was off and I was never forewarned of TMJ complications. The dentist appeared impaired on several occasions. On the last visit, he ground down several of my natural teeth, with out my permission trying to get his ill fitting crowns to fit, exacerbating the problem. I fired him. Ten days after the last time the dentist treated me he was hospitalized with major hip replacement surgery. It's probable he was on pain medication, impairing his motor skills and judgements when treating me. The new trial judge refused to do an in camera review of Dr. Shain's medical records from a previous court order to produce them which defense atty. Brown had ignored in contempt of court.

I never had any prior jaw problems or injuries to my jaws until I went to this dentist. One week after I fired Shain, Dr. Kohani diagnosed me with TMJ, occlusions off, an open margin, Shain's work needing to be replaced, & partial/ permanent disability likely. Most opinions diagnosed the same problems. When subsequent dentists knew I would pursue Shain to pay to fix the damage he and his unlicensed assistant had done, many refused to give me my own records. Some completely lost them, or provided partial or altered records, or summarizations. X-rays to chart notes disappeared.

Dr. Coffey, treated me for 8 to 9 months trying to correct the damage done by Shain and his assistant (**App.69-71**). I was in terrible stabbing pain. UCLA ordered an MRI almost a year after Dr. Shain's treatment which showed both disks in my jaws were dislocated in front of the joints which is why I am prevented from opening my mouth. The MRI's confirmed no past injuries. Part of Shain's work has fallen out but no one can get a drill in my mouth to fix the damage.

In May of 2000 I legally protested near the dentist's office on four occasions, with police instructions (**App. 69-72, 77-78**). I was in pain, I could not access my own dental records, bad dental laws needed reform, I couldn't get an attorney to take my case, and the same unlicensed assistant was still drilling in people's mouths posing a threat to society, in my opinion (**App.89**). I handed out flyers to raise public awareness, and to forewarn and inform the community, including my opinion summarization laws were unconstitutional and needed reform, like my complaint stated. T.V. stations talked to me. The dentist filed a slapp defamation suit against me, case #GIN004958 in Vista, Ca. A restraining order was denied. I never picketed again. He later dropped this suit avoiding production of his court ordered *drug* records. The trial judge in this case disallowed jurors from knowing anything about my protesting in the malpractice case and **forbid me to talk about my picketing at all or my reasons for it**, claiming a 352 hearing issue, which I didn't understand. My protesting's significance far outweighed her reasoning (**App.**

77-78, 92-93). CTp 42-45 "I've decided no, I don't want to get into the picketing. I don't want to hear about the picketing. I don't want to hear she went there...." This negated my rights to freedom of speech on major constitutional issues effecting my case & in my complaint (CRp18-20) (**App.12-13**). This ruling snow balled into excluding Dr. Coffey's deposition testimony he believed Shain committed malpractice and was the cause of my TMJ/TMD injuries as his statement was made while denying assistance to Shain related to my protesting him **(App.69-72)** (brief pgs 2,9, 27, 29,36-37,47; reply brief pg28-34; rehearing pg23, CA Supr. Ct. pg 24).

At trial, Kaplan misinformed me spoilation was moot (**App.82,86**), but I substantially testified my records belonged to me and they wouldn't give them to me. Most were lost, altered, or summarized, so I filed complaints with the Dental Board, laying the foundation of spoilation in unconstitutional acts of many dentist's records. (Brief 36-39, reply brief 29-34, rehearing 42-44, (**App.102-103**)CTp369,491-500,1085.)

The defense firm only tried the case because Kaplan made so many pre-trial errors, excluding my experts full opinions, erratas, and most evidence proving my case, & concealed documents from me this was his fault until after my reply brief was filed, blaming the judge and Brown instead for all adverse rulings. The judge never told me he missed all time lines to get evidence in. I fought all post trial actions for reversal based upon the wrong set of facts (**App. 44- 50, 24-26,28,42,62,65-72,74-76, 79-89;** brief 2, 6, 24,25, 39-45, 47-48, reply 3,40-42; rehearing 4, 6-9, 23,42-44; CA Supr. Ct 8,22-27) **Over 18 areas of my case were not allowed to be tried** to prove Shain's negligence. Judge Lisa Guy-Schall was new to this case, didn't know the facts, was misled by both counsels, Kaplan's silence, and suppression of evidence in rendering rulings preventing major portions of my case from being tried. I'd never been through a trial before to know how it worked and I trusted & relied upon my attorney. The judge didn't let me speak to correct errors or misrepresentations & I knew of no options. Jurors decided without my

expert's full testimony, or most of my evidence.

On 4/4/02 I filed a 3rd Amendment to the subsequent malpractice complaint against Kaplan, case #GIN019954. My expert, atty Steven J. Freeburg, declared six areas of Kaplan's malpractice (**App.79-81**). I know of no recourse left for medical intervention for the injuries Shain gave me except by this filing. I am requesting relief from the U.S. Supreme Court for this **double malpractice jeopardy to me** denying my constitutional rights, reversing the verdict, & granting a new trial in a different court with *all* the evidence, and to recover all costs.

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

Dr. Shain saw me in June 1998 and treated me from August 13, 1998 until September 15, 1998. I noticed the defendant on August 13, 1999. The mal-practice suit was filed timely on November 8, 1999. On February 8, 2000 a First Amended Complaint was filed . In May of 2000 I picketed Shain and he filed a defamation suit against me. In September of 2000 I got an attorney, Michael A. Kaplan. On February 6, 2001 the trial began but most of my evidence surprisingly was not allowed in. On Feb. 15th deliberations began. After being dead locked for days, on Feb. 20th the verdict changed for the defendant at 9-3. The trial judge recused herself in post trial actions. My new trial motion by a different judge, was denied on April 19, 2001, and reconsideration was denied in May of 2001. In May of 2001 the defendant, Shain, dropped his defamation suit against me instead of providing his drug records per a court order. All appeal papers were filed timely. The D.A.'s office recommended I should file a malpractice suit against Kaplan which I did in April 02', but he refused to file a claim with his Ins.Co. & he has no assets to pay for the medical help I need, negating the suit as a viable remedy for me.

The unlicensed assistant was granted summary judgment for her liability to me on 9/7/00 because she was an employee of Shain. She became re-licensed 4 months prior to trial on 10/2/00 after a 15 year lapse **(App.62-63)**.

My 3rd cause of action for spoilation of evidence, in-

cluding constitutional issues related to summarization laws, was demurred out on 5/11/00 due to Cedar Sinai Medical Center v. Superior Court, making spoilation moot. Unknown to me, prior to trial in 1/01, spoilation was reinstated reviving Baji 2.03. This was never tried, but should have. **(App.29, 82)**

Kaplan took this case 4 ½ months prior to trial. At the trial I was in pain, hearing impaired, and not privy to numerous attorney only side bars, some **12 minutes which were not recorded**, concealing from me and all appellate judges what really happened **(App.43)**. **Over 18 areas of my case were never tried.** I had substantial evidence proving my bite alterations which was never heard. Brown with held Dr. Kohani's x-rays I requested from him proving my bite alterations **(App. 6, 23,28-29,103**; brief 19- 23,42; reply brief 39). Jury exhibits were released to Brown who never let me see the exhibits again. Then I lost the new trial. Kaplan withheld documents concealing **he missed all his time lines to get evidence in** until after I filed the reply brief **(App.44-50;**rehearing 2,3,6,9, 13,14,-23, 42-44; CA Supr. Ct 8,12,15,19-22,24,26).

I filed all appeal papers timely. I received the trial transcripts on 10/30/01 which I challenged, shocked my attorney said so many horrible things without my knowledge. In 3/02 the Court Reporter's Board confirmed the transcripts were accurate. Four others at trial corroborate they are not accurate in places, including jurors, & my expert, as some testimony is missing and wrong **(App.74-76)**. Jurors corroborate testimony given at court but it is *not* in the transcripts. The brief filed on 5/20/02 had to be based upon the transcripts. Reply brief was filed on 8/8/02. In September 02', Kaplan produced documents from Brown he'd fought giving to me showing his errors **repeatedly missing time lines to get evidence in.** He knew he caused my evidence to be excluded, concealed it, & did nothing to remedy it to get evidence and witnesses in before trial, sealing his errors **(App.44-50, 84-86)**.

Oral argument was on 2/13/03. I called the clerk to find out what to expect, to be prepared. I was told I had 15 minutes to speak to argue and the opposition had 15 minutes.

I filed a motion for an additional 5 minutes for argument but it was denied (**App.22**). I planned to use my 15 minutes to read my notes detailing the issues which I timed I could read in 15 minutes. The Judges wouldn't let me read my notes & they took 5+ minutes of my time allowed, with questions re-directing arguments I hadn't allowed time for. Then they **cut me off** in oral argument before I could finish my points in my notes about my attorney's wrongful acts concealed from me until after my reply brief was filed, and addressing HIPAA's new laws, spoilation, and summarization laws. They denied the appeal 4/7/03 and my rehearing with this information on 5/1/03. The California Supreme Court denied review on 6/25/03. A remittitur was issued on 7/1/03 (**App.21**). I am requesting the lower court's decisions including the appellate decisions are reviewed & reversed due to prejudice and illegal rulings, granting a new trial in a different court with all the facts tried including constitutional issues I addressed before but the court would not hear, & my costs are reimbursed.

II. STATEMENT OF THE FACTS: ARGUMENT OF REASONS WHY CERTIORARI SHOULD ISSUE RELATED TO THE QUESTIONS BEING REVIEWED

State statutes protecting the public from inimical acts posing a threat to the health, safety, and welfare of patients in dental healthcare clearly make it "illegal" to practice as a registered dental assistant (RDA) without a current, valid license or to aid and abet an unlicensed person in the practice of RDA work. Patient's have a right to refuse unwanted treatment but I was not given that option. Court rulings corroborate the **"undisputed fact with the judge and attorney's" the assistant was unlicensed, and there is no dispute she performed substantial work on me,** fabricating and equilibrating the temporary crowns, which had to be re-adjusted on subsequent visits. Dr. Sperber testified the failure to properly equilibrate first the temporary crowns and then the permanent crowns was the direct cause of my TMJ disfunction. Statutes were ignored; wrongly rewritten; and federally changed. Many records were summarized, altered,

or withheld negating the right to recourse. Attorney's misled the court, jury, and me. Kaplan grossly misrepresented me. Judicial errors prevented me from trying the most important parts of my case.

ARGUMENT TO QUESTION "A"(1)(2)(3)(4) on pg -i-

Consider the negative effect of the court's rulings in future cases, statewide and nationwide, undermining required licensing in health care professions protecting the public, assuring health care providers meet minimum standards of education, and skill to practice safely for the public good. Sacrenty was only licensed for one year in 1984 to 1985, then let her RDA license expire. She worked on me in 1998 after a 13 year lapse in her license with no continuing ed, nor continuously working in dentistry, and no one told me this. Shain never verified Sacrenty's license when he hired her in 1996 but knew at his deposition her license expired in 1985. (**App. 62-67, 5, 6,11,24-26, 90-91**). The judge denied jurors from knowing this and denied Kaplan impeaching Shain saying otherwise (CTp972-973, brief 5-7,14,17-28; reply brief 11-13,26;CA Supr.Ct.1-4). Sacrenty got a new license in 10/00, prior to trial. Statutes state one *cannot* perform RDA work in CA with an *expired* license (**App.24-26**).

In 13 Ca. Jur. 3d (Rev) Part 1 page 107 section 51:Allows the Appellate opinion to serve as the foundation for an application for a writ of error/certiorari to the Supreme Court of the United States. The Appellate opinion of this issue is completely opposite of long standing statutes of public policy and licensing requirements in health care(**App.5, 6,11, 24-26)**

All statutes begin with the assumption the statute is correct. California Teachers Ass'n v. State Bd. Of Education (**App. 35**). California Procedure 4th Edition Vol 9 section 955, 956 states: "...the strongest reason for overruling a decision is that it is contrary to a statutory provision that was either **not discovered, or was known but ignored in the opinion**". Alferitz v. Borgwardt. (**App. 35**)

Brown misled the trial court judge by not revealing when the assistant's license expired in 1985 (**App.97-98,**

106) (brief pgs 19-23), the judge never asked when it expired, and my attorney didn't correct it in the beginning of the trial (CTp 17-18, brief pgs 4-27)). CTp48-56 discusses the licensing issue and the attorneys switching out state filed documents on the judge which verified the license expiration date (**App. 51-62, 93-94, 5, 6, 97,98**). The judge claimed she read the statutes (CTp58-59), believed the license expired recently, and then she granted a motion in limine preventing me from arguing the assistant's suspended license established negligence per se. She saw I was upset. Instead of allowing me to speak to correct it, she scolded me for being upset she just threw out the most important part of my case based on wrong facts, *twice*, CTp54 &58. On CTp972-973(**App.96,97, 106**) the judge refuses Shain's impeachment when knowing all along the license was expired, but *now* knowing the license expired in **1985**, *not yesterday*, concealing this from jurors.

The Appellate Court ruled on **App.5**, "...the annual fee Shain's assistant was required to pay was not designed to protect patients and the assistant's failure to pay it would not establish negligence per se... Thus the trial court did not err in limiting Mitchell's ability to establish a negligence per se theory of liability." They quoted Daum v. Spine Care Medical Group. It was over ruled on pg1318 concluding the Daums were prejudiced by the court's instructional errors. (**App.36**)

My jury's instructions were prejudicial & erroneous. The statutes applicable to this case are clear, unambiguous, understandable to the layman, and completely opposite of the Appellate Court's rulings. My attorney never asked my expert any questions about Sacrenty's expired license at his partial deposition (**App.13,15-17,96-97**) (brief pgs 24-25, reply brief pgs 4-5,rehearing pg 8-9, CA Supreme Ct. pg 22-25), nor corrected it later, nor researched to find these statutes. The statute he did have, he missed his stipulated time lines to submit (**App.45,47,49-50**). I'm not an attorney, yet I found most of these statutes later and included them in my briefs (**App. 24-26**). The next two I discovered and added for my Rehearing re-sponse to the Court's rulings, which I thought were

"common knowledge":
*California Code of Regulations, Dental Practices Act,Business and Professions Code:
*Chapter 4, Consumer Affairs section 301, Legislative Intent, It is the intent of the Legislature ...to promote and protect the interests of the people ...(b) **protecting the consumer from acts, or practices which are inimical to the general welfare of consumers.**
& *section 145(a)(b) ..., **unlicensed activity** is a **threat to the health, welfare, and safety of the people.**
& *Article 2, section 1626 ..., it is **unlawful** for any person to engage in the practice of dentistry **unless the person has a valid, unexpired license.**
& *Article 2, section 1625(b) "...a person practices dentistry who(b) **Performs** or offers to perform an **operation or diagnosis** of any kind, or treats **associated structures or corrects malposed positions thereof**;"
& *section 1680 (c) (y)(cc)(ee): ...Unprofessional conduct by a person licensed is defined as the violation of:(c) The **aiding or abetting of any unlicensed person to practice dentistry**;(y) the aiding or abetting of a ...dental auxiliary to practice dentistry in a negligent or incompetent manner; (cc) **Engaging in the practice of dentistry with an expired license**; (ee)The utilization ...of any person to perform the functions of a RDA who at the time of initial employment does not possess a current valid license to perform those functions.
& *Title 16, Article 5, section 1085 (a)(3)(7):.. **a dental assistant may not** perform the following functions or any other activity which represents the practice of dentistry or requires the knowledge, skill and training of a licensed dentist: (3) **Fitting and adjusting of correctional and prosthodontic appliances**; (7) **Taking of impressions** for prosthodontic appliances
& * § 1764 states: Any person other than one who has been issued a license who hold himself out as RDA, or uses any other term **indicating or implying he is licensed** by the

board ..., is **guilty of a misdemeanor**".

& * Chapter 4, Continuing Education, § 1017(a)(3): As a condition to renewal of a RDA license during the succeeding two year renewal period;...each licentiate shall complete, a course in *basis life support and complete* **25 units** of con't ed requirements.

The Appellate Court's rulings are unquestionably "illegal" next to the statutes. The Court affirmed facts in the case including testimony by Shain, the assistant, myself, and my expert were *undisputable* the **unlicensed assistant** performed substantial work on me (**App.6**), i.e. fabricating, placing and adjusting my new temporary crowns, and the work required additional adjustments at subsequent appointments. My expert testified this started my TMJ problems. The Court of Appeal ruled (**App.5**),fees were not designed to protect patients and failure to pay it would not establish negligence. Statutes say the complete opposite (**App.24-26**). Their ruling is in conflict as the work she performed, according to the statutes, required her to be licensed and was "illegal" to perform without a license. The dentist was liable for allowing her to do these acts CTp567-569. I testified about her on CTp 142-143; Sacrenty testified her RDA acts on CTp 583, 600-601& 610, 613(**App.99,100,103,104,106**);brief 4-14; reply brief 11-22; rehearing 12-30; CA Supr. Ct.8-12. **I must conclude no one in the state of California will enforce these statutes.**

The assistant's unlicensed and unqualified status was a major issue in my complaint and all pleadings up until the trial when Kaplan took over and then a newly appointed judge took over who was not familiar with the case. The assistant's liability was demurred out in 5/11/00 as she was an employee of Shain, making Shain responsible for his employees. Injury resulted, yet she was not held accountable for her acts, nor was Shain held accountable as jurors were not properly instructed to know what his duty was, leaving them to *guess*. According to the court's rulings, **anyone with an expired license can practice RDA work in CA** which is completely illogical, immoral, and "**illegal**". If this ruling

applied to general health care, half the population would be rendered handicapped or extinct. **Shain never informed me to give me a choice** if I wanted an unlicensed person who was not qualified by the state, to do this work, *which I didn't.* He had no right to put my health at risk without my knowledge and consent. If I'm the only one courts have ignored public policy statutes with in dentistry rulings, then discrimination and prejudice is absolute. If this happens often, the state is misleading the public, lulling them into a false sense of safety trusting in police power that has no force, or "teeth" to enforce compliance. **The court's rulings astonishingly condone that which is expressly prohibited**, and therefore must be reversed. No statutes allow this exemption for fees. The statutes are clear for the layman to understand, one must be **licensed** to practice RDA work.

This ruling was made before the trial started. Brown misled the judge the assistant's license had simply expired for not paying fees, *like it expired yesterday.* He knew her license actually expired 13 years prior to treating me, in 1985, and had never been renewed up until four months prior to the trial in Sept.of 2000. Brown and Shain reviewed this same state document at Shain's deposition, from a previous malpractice suit 1 ½ yrs. ago against Shain with the same unlicensed assistant in issue and the same judge, which is exhibit #11 in Shain's deposition record and was attached to opposition to motion in limine #2 (**App.62, 65-67**)(brief pg9; reply brief 11-13, 40-42; re-hearing 13,23-26; CA Supreme Ct.22, 26-27). Sacrenty worked on me in 1998 without a license, illegally, and without my knowledge she was unlicensed, immorally. CTp48-50 details *both attorneys colluded and switched out documents on the judge* removing the state's documentation of the license expiring in 1985 from the opposition to motion in limine #2 on file with the court, replacing it with some unknown errata (**App.51-62**) (brief pgs21-23, reply brief pgs11-22, rehearing pgs12-23, CA Supreme Ct. pgs8-18). This key document of the assistant's unlicensed status since 1985 by the state turned out to be a document

Kaplan concealed from me he missed his stipulated time line to get into evidence and he with held the records of Brown showing this until after the reply brief was filed for me to discover and plead this (**App.44-50**). Then the Appellate judges prejudicially **cut me off** before I could tell them. The attorneys replaced the license document with an alleged errata concealing the switch from the judge and me. My attorney lied telling me the judge had the license document, knowing she did not, & told me *I would be arrested* if I told jurors when Sacrenty's license expired per the judge's ruling. **These acts poisoned the entire trial** denying me my constitutional liberty rights, & constitute contempt, **and violate an attorney's oath of truthfulness**. Later the judge was informed the assistant's license expired 13 years ago but she refused to let jurors know this, nor to impeach the defendant's perjuries, misleading jurors to a false verdict without trying this issue.

I believe the court has exceeded it's jurisdiction changing a well established statute of public policy deeply rooted nation wide, rendering an irrational ruling contrary to the public good, promoting and condoning unlicensed activity in health care. The question becomes, "Would a reasonably prudent person, if they had known she was not licensed, have agreed to hire the unlicensed assistant to go ahead and take impressions, fabricate their crowns, and adjust occlusions using a drill in their mouth?" No sane nor reasonable person would. I thought I hired a qualified professional to do the work. Instead I unknowingly got an unlicensed person with poor skills performing substandard dentistry work on me altering my bite and jaws leaving me permanently disabled. (Brooks v Wilson is identical for causation (**App.42**)). If the court's ruling was correct, no health care providers would have to qualify, or update their skills and knowledge, with no one to answer to, essentially playing Russian Roulette with the public's health. Yet, this is what Shain and unlicensed Sacrenty were shamefully allowed to do to me, with the courts condoning their "illegal" acts.

Per US Sup. Ct. Digest US Mo. 1990 in Cruzan by

Cruzan v. Director, Missouri Dept. Of Health"Constitutional Law Section 528.5: Pursuant to the Federal Constitution's 14th Amendment, a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment". Shain never gave me that opportunity to make that decision for myself. If known, **I would not have consented**. Teeth do not regenerate. Denying informed consent instructions, and statutes, prejudicially denied me the right to legally try my case. **Jurors made lawless decisions** without statutes.

In City of Pasadena v. AT & T Communications of CA.,(**App. 36**)the judgement was reversed. The court applied a **plain meaning rule** interpreting legislative enactments; & courts may not rewrite the law. The language in the statutes is not vague, one cannot perform RDA work without a current license. The new licensing exemption ruling is invalid.

Code of Civil Procedure section 1858, Construing Statute -Interpolation Forbidden and section 1859. (**App. 37**) The tougher restriction, restricts. The judge did not reference any specific statute but generalized stating she read the statutes (CTp58) (**App. 97-98**) alleging reliance she had knowledge of the statutes. Her pursuit of the legislative intent prejudicially ended there constituting reversible error. If she had pursued the intention of the legislature, her decision would have conformed to the statutes, giving the instructions.

In California Jurisprudence 3D 2003 Cumulative Supplement of Constitutional Law section 138:U.S. Constitution Article 6 cl. 2. PTI, Inc. v. Phillip Morris Inc., "State legislation of health and safety matters is presumed constitutional under the Supremacy Clause; the presumption may only be overcome by a showing that preemption was the clear and manifest purpose of Congress". The appellate court failed to show preemption so the ruling cannot stand.

In 13 Cal Jur 3d (Rev) Part 1 section 145, "The rights of the individual are subordinate to the general public. Thus, it is fundamental that the constitutional guaranty of the enjoyment of liberty is subject to the exercise by the legislature of the police power of the state". Statutes make the rulings

illegal, but the state took no action against their acts, and did not allow the case to be fully tried. After the trial,the Dental Board determined Shain's work *was a departure from the normal standard of care, including the unlicensed assistant* (**App.90-91, 74-76**)(brief pg 2, reply brief pg 8).

If proper instructions had been given a different result is probable. Jurors were concerned about the assistant's actions by requesting Dr. Sperber's signed document shown to them accusing Shain which clearly stated it was beneath the standard of care for Shain's assistant to adjust occlusions using a dental handpiece in the oral cavity (**App.73**; reply brief 11,19,26-27, 38-39; rehearing 3,22,29-30). This evidence was denied to them in deliberations. Jurors also asked for the definition of equilibration. Sacrenty admitted she equilibrated crown #30. My expert testified first the temporary crowns and then the permanent crowns were improperly equilibrated causing my TMJ disfunction. The unlicensed assistant admitted in court she fabricated and made several adjustments to temporary crown #30 using her own judgment. #30 was left high and readjusted at subsequent appointments. The permanent crown #30 had to be replaced due to Shain over grinding it flat and because it had an open margin, likely due to the retraction cord Sacrenty left when taking the impression to fabricate the crowns. Jurors asked for a read back of plaintiff and defense experts looking for answers. They were deadlocked with out half my evidence ever being seen (**App.44-46;**CRp597,602, 605,608,610). They asked for more instructions to interpret Baji 6.30 and 6.02. Because Baji 6.30 was given requiring only expert testimony to determine the standard of care & my expert wasn't allowed to return to finish, & no statutes were given; Sacrenty's testimony, my testimony, and my witnesses were not allowed to be considered in their decision; T**he instructions they got favored a defense ruling, coercing my losing**. My expert was prejudicially not allowed to return, due to Kaplan not telling the judge in time. He blamed the judge for the this, so I did, too (**App.84-86**). The Appellate Court (**App. 15-17**),

and my new expert (**App.79-81**), blame this on Kaplan. On CTp142 I was asked, "Can you describe the work that Ms. Sacrenty did on your teeth." My answer was wrongly stricken that Sacrenty also drilled on a filling Shain left high on a real tooth #31when she drilled in my mouth adjusting the crowns all with out any supervision, nor Shain returning to check her work. Sufficient evidence was given to justify giving negligence and informed consent jury instructions (brief pgs.6,8, 33-34, reply brief pgs 9-20) By denying jurors to try these major theories of my case I was denied a fair trial **leaving me injured with no recourse** for medical treatment. The verdict should be reversed, a new trial granted, and my costs paid.

ARGUMENT TO QUESTION "B".

(brief pgs19-27, reply brief pgs3-5, 11-13, 20-22, rehearing pgs6-8 &24-30, CA Supr. Ct. pgs 14-18,26-27)

In 36 Cal Jur 3d (Rev) Part 1 section 52, Suppression of evidence by the state of material evidence deprives a defendant of due process of law, and the suppression of material evidence that bears directly on the question of an accused's guilt, or on the question of the credibility of the key witness for the prosecution, results in the denial of a fair trial.

See U.S. V. LaPage (**App.38**) All perjury pollutes a trial. The jury was close at 9 to 3. By **not allowing impeachment**, the errors were very damaging, **causing jurors to have to decide in favor of the defendant because they went unrefuted**, per the judge's rulings. If jurors were allowed to weigh the evidence they'd have known Shain lied to them when he produced the false photos and testified they were mine, proving I grind my teeth, exonerating him. His photos had the #11 eye tooth ground flat on the end which he testified proved I ground my teeth and caused my own TMJ. A big gap was between teeth and several sequential teeth were missing. If jurors had compared the photos to my real teeth, or if I'd been allowed to refute & explain the differences, or if Shain's "before x-rays" admitted in had actually been given to jurors in deliberations (jurors say they never got the x-rays) to compare to the photos, **jurors would have known**

Shain lied to them &presented false evidence for them to rely upon, known he was not credible, and would've decided in my favor. My eye tooth comes to a point, I have no gaps, & I'm not missing sequential teeth. The judge wouldn't allow my expert to return for redirect & rebuttal testimony to refute the photos when she had prejudicially ruled only expert testimony could refute them (**App.9-12, 15-17**). A five year old could have told the difference. Kaplan didn't speak up when asked & the judge refused to hear me when I said Dr. Sperber would return, when Kaplan remained silent. She & Kaplan left me no way to defend myself, condoning **extrinsic fraud**. (brief pg 33-36) The Court of Appeal ruled on **App.11 -12** regarding my objection that Baji 6.30 (**App.33**) was given as some evidence jurors were just as able to weigh as an expert and the photographs were one of them: "We agree with Mitchell that in determining the authenticity of the photographs the jury could use its common sense. However, nothing in Baji 6.06 *(***Note added for clarification on App.11; 6.06 is a type -o** *corrected later to Baji 6.30*)(**App.31,33**) prevented them from doing so. By it's terms Baji 6.06 *(typo, should say 6.30)* is restricted to the standard of care required of a professional. It does not govern the authenticity of any evidence offered by the parties. Indeed, with respect to the authenticity of any evidence relied upon by experts, the jury was given Baji 2.40, (**App.30**)stating: "An opinion is only as good as the facts and reasons on which it is based. If you find any such fact has not been proved... you must consider that in determining the value of the opinion. In light of Baji 2.40 (**App.30**), it is clear Baji 6.30 (**App.33**) didn't prevent the jury from using it's common sense in determining the authenticity of the defense photographs", ruling it was not error. *I disagree* (brief pg 33)(**App.13-17**). The court's rulings were very damaging, not allowing me to defend myself against perjuries nor allowing jurors to weigh the evidence, *forcing* them to believe I grind my teeth (grinding causes TMJ) when I don't because the judge didn't allow me to refute it. Baji 6.30 (**App. 33**) states **if expert testimony is not required, Baji 6.30**

should not be given. The appellate court ruled jurors could have made up their own mind. Thus, giving Baji 6.30 was prejudicial & wrong. If not for this defense strong hold in limiting testimony and giving Baji 6.30, I could've refuted the obvious perjuries myself, Baji instructions of informed consent, res ipso loquitur, & negligence by using an unlicensed assistant and statutes would have been allowed, & I'd have won. Compounding this, Baji 2.04 (**App.29**)was prejudicially given, **allowing consideration of a party's failure to explain or to deny evidence**. The judge wouldn't let me deny the false evidence Shain fabricated to free himself from liability. Baji 2.02 (**App.29**) was also given, "If weaker and less satisfactory evidence is offered by a party, when it was within such party's ability to produce stronger & more satisfactory evidence, the evidence offered should be viewed with *distrust*". The judge prejudicially instructed jurors to believe lies by refusing to allow me or my expert to refute them.

I prejudicially was not allowed to impeach Shain's testimony his assistant was a RDA for the last 8 years when the Judge, Shain, & Brown knew this was false. At Shain's deposition both were confronted with state documents verifying the assistant's license expired in 1985 and knew she had not renewed the license in 98' when working on me (**App.62,**(&65-67)). App.62 was attached to opposition for motion in limine #2 filed with the court, but the transcripts state this document was switched out on the judge to an alleged errata causing the court to rule against me from the beginning of the trial. The judge refused to allow me to speak to correct her wrong facts when she made this erroneous ruling denying my 1st amendment and liberty rights to protect myself. Turns out, *this is a document Kaplan concealed he submitted too late so Brown refused it.* (**App.44-62**) Then "court filed opposition papers" were switched out on the judge who ruled on it excluding a major part of my case. Later, when Kaplan wanted to impeach Shain's testimony stating we had evidence to prove Sacrenty's license expired 13 yrs. ago, the judge refused stating it was the first she'd heard of a 13 yr. lapse. Then Baji 6.06 & informed

consent (**App.31-32, 65-67,92, 98, 105-107**) was prejudicially refused. If jurors had known the State documented Sacrenty's license expired over 13 yrs. ago, & Shain knew this and lied to them in court, they would have decided *for* me. Shain's false testimony should have been allowed to be impeached to reveal his character and credibility. Jurors decided the case on false facts the judge ordered couldn't be disputed, railroading me. (Brief 25-27, reply brief 41-42, rehearing 23-26)

I was denied my 1st and 14th amendment rights to present the most important parts of my case and to refute false evidence and testimony(Brief 2,4,7,28,36-38; reply brief 27-34; rehearing -v-,7-9, 15-23, 25-28, 38-44; CA Supr.Ct 8-9). Like U.S. v. LaPage (**App. 38**), this case calls for reversal. Page 8 in my petition to the California Supreme Court for review, details over 18 instructional errors, judicial errors, and attorney errors, perjuries and false material evidence, misrepresentation & suppression of evidence, pled in all briefs denying my rights to a fair trial. The U.S. Constitution's 1st & 14th Amendments(**App. 41**) allowed me to impeach Shain's testimony & evidence.

ARGUMENTS TO QUESTION "C".

The judge prejudicially denied instructions of (**App.31-35,24-26**)informed consent (Baji 6.11), res ipso loquitur (or in part Baji 6.35 & 6.36), liability for assistants (Baji 6.06), statutes regulating the standard of care (Cal. Code of Regulations, Dental Practice Act) & negligence, & agency. Testimony and evidence was given supporting giving all the instructions, most without needing *additional* expert opinion.

See Ng v. Hudson (**App.38**). "...it is inherently prejudicial error for a trial court to refuse to give instructions covering each party's theories of the case which are supported by the pleadings and the evidence..." In my case the judge weighed how many experts testified for the defense v. my one expert, then prejudicially only recalled testimony favoring the defendant, ignoring my expert's extensive testimony of Shain and Sacrenty causing my injuries(brief pgs 10-13,31; reply brief pgs 23-27; rehearing brief pgs31-37;), ignoring my testimony, & ignoring Sacrenty's testimony of the significant **work**

she admitted she performed on me. My expert gave substantial testimony warranting res ipso loquitur or conditional, supported by Sacrenty and myself. If jurors had weighed testimony themselves, they may have believed the evidence showed Shain and Sacrenty were negligent and caused my injuries. I had no past history of any jaw problems nor injuries until I went to Shain's office and was injured. Subsequent dentists noted Shain's work needed replacement and occlusions were off. My expert was not allowed to return for redirect & rebuttal, due to Kaplan, complicating the prejudicial application of expert only testimony allowed as Sperber was not finished giving his opinions based on his partial deposition, nor rebutting defense testimony. Hale v. Venutto supports that res ipso loquitur and informed consent (**App.31-35**) do not require expert testimony so Baji 6.30 requiring only expert testimony to decide should not be allowed to be given. Jurors should've been allowed to weigh my testimony and Sacrenty's of the work she admitted doing. **Informed consent is based upon the disclosures or lack of, given to me prior to treatment which a reasonably prudent person in my position would want to know, to make an informed decision to accept or deny the treatment.** I testified (brief 7-9; reply brief 11-12; rehearing 13-14;CA Supr. Ct.15-18): Shain ground down my real teeth without my permission attempting to get his ill fitting crowns to fit; Sacrenty used a drill in my mouth and adjusted the crowns and a new filling Shain had left high, the later was wrongly stricken; I found out after the treatment Sacrenty was not licensed (**App. 5,6,11**). If I'd known she wasn't licensed I never would have allowed her to fabricate and adjust my crowns; They had me sign the consent form *after* the treatment was done; No one ever warned me about TMJ when my jaws were hurting. My testimony was sufficient to give informed consent instructions. Not giving these instructions greatly injured me and deprived jurors of weighing all testimony.

Ng v. Hudson (**App. 38**) the trial court could not validly determine whether to give an instruction by weighing the conflicting evidence. Despite the fact that the court may have been

convinced by the evidence that plaintiff's condition was entirely preexisting ...it was prejudicial error to deny plaintiff a jury trial on that issue. The trial judge in my case over rode my expert's dental opinion with her own dental opinion (brief pgs28-32, reply brief pgs 23-25, rehearing pgs 30-37)and had no right to decide juror issues. Evidence and testimony was given to warrant giving these jury instructions. By denying the jury instructions, I was denied a jury trial. Half the issues in my complaint were never tried due to rulings of jury instructions which should have been ruled *favoring trying my case*.

Jurors were instructed with Baji 15.22 which states: "The purpose of the court's instructions is to instruct you as to the applicable law so that you may arrive at a just and lawful verdict..." The problem is (see Galvez v. Frields and Gannon v. Elliot), jurors were not instructed with the applicable laws or statutes setting the standard of care in dentistry to arrive at a lawful verdict, nor to know the dentist's duty to be able to find Shain was negligent in allowing his unlicensed assistant to perform acts which under California law &common law are only performable by licensed qualified RDA's. (brief pgs4-7, reply brief pgs16-22, 25-27, rehearing pgs12-23, US Supr. St. pgs8-17) Sacrenty was allowed to use her own judgement.

Evidence Code 669(a)(1): **The failure of a person to exercise due care is presumed if he violated a statute, ordinance, or regulation of a public entity.** The defendants violated many statutes (**App.24-26**) but jurors were never instructed with the statutes to make a just and lawful verdict. Jurors were also instructed with Baji 6.00.1 (**App.30**), but never instructed with the statutes to know what those duties were according to the laws. They were left to their own devices to determine what was allowable. Defense experts wrongly were not allowed to answer licensing questions. My expert was denied return rebuttal testimony although plenty of time was left the final day to tell jurors his views based on the statutes. Kaplan's silence sabotaged my case. Plus the judge refusing to hear me when I spoke up, when Kaplan didn't.

How can jurors judge without knowing what the

standard is according to the applicable statutes and laws ? US Supreme Court Reports, Giaccio v. Pennsylvania and Lanzetta v New Jersey (**App. 39**) Not giving the proper instructions left jurors without knowing what was prohibited. Jurors made an erroneous and illegal decision of law without any legal guidelines instructing them the defendant's acts were "illegal". Because the acts were "illegal", an exception is granted according to 13 Cal Jur 3d (Rev)Part 1 section 57 of constitutional law allowing this federal question of constitutionality of the statutes, liberty rights, equal protection, due process, and 1st amendment rights to instruct the statutes & plead in appeal.

In Stahlin v. Hilton Hotels Corporation (**App.39**)...Pg 585, ...the court ruled the acts of the unlicensed assistant fell within the statutory prohibitions and jurors should have been permitted to weigh if delegating duties to her constituted negligence. It was remanded for new trial re: Dr.'s liability. Burkhart v. Randles quoting Haislah v. Walton, McGee v Cessna Aircraft Co. (**App. 40**), was reversed as the jury had been erroneously instructed and a judgement obtained based upon a wrong application of law cannot stand. In my case if jurors had been properly instructed with statutes jurors would have found the dentist was negligent.(Grudt v. City of L.A.).

The court ruled I could not bring up constitutional issues for the first time on appeal contradicting other cases. People V. Cameron (**App. 40**) (Cal.Jur.3d, Constitutional Law section 61;Am.Jur.2d, Constitutional Law§115). In 13 Cal Jur 3d (Rev) Part 1 § 57 and in California Civil Writ Practice § 318(b) & in California Civil Appellate Practice § 5.44 lists exceptions to the rule issues must've been raised in the trial court first. My rights to speak up for my own best interests to correct wrong facts were denied and violated by a law allowing only my attorney to speak to the judge, who did not; & without exceptions for me if I was being misrepresented. (**App. 41, 77-78, 12-13,97**;Ctp 42-45,96-97) The 1st amendment to the constitution declares congress cannot make or enforce laws abridging the freedom of speech, but this law did. I wasn't allowed to speak when being wronged which is not justice or equal protec-

tion. Burrows v. State, Conservatorship of Delay (**App. 40**).

ARGUMENTS TO QUESTION "D"

The Appellate Court ruled I could not bring up constitutional issues for the first time on appeal (**App.12-13,**). I challenged the unconstitutionality of summarization laws in my 3rd cause of action in my complaint which was demurred out as moot prior to trial. The defense knew my opinions from numerous pleadings. I protested and lobbied for reform before & after the trial. I contacted every senator and assembly member I could for reform of these bad laws, stripping people of their rights to fair recourse in personal injury suits when wronged. The **judge ruled I couldn't speak about my protesting** & prejudicially didn't want jurors to know the reason why I protested. This snowballed into Dr. Coffey's testimony he believed Shain committed malpractice and caused my TMJ, & constitutional issues of summarization laws from ever being heard. (**App.14-15,92-93,69-72**)(brief pg2,9,27 27,29,36-39, 47; reply brief pgs 28-34; rehearing pg23; CA Supr. St. pg24;CTp42-45; CRp 164-165;Lodge #48). She denied my 1st amendment rights on 1st amendment issues. I was told to only answer the question asked. Kaplan never asked constitutional questions & told me spoilation was ruled out when it wasn't. It should've been tried.

Constitutional issues were allowed the 1st time on apeal: People V. Cameron ;Civ. Serv. Employees Ins. Co. V. Sup. Ct.; California Pools, Inc. V. Pazargad; Morrison v State Bd. Of Educ. Supra; Ward v. Taggart; Powell v. Premier Ins; Monterey Club v. Sup. Ct., Conservatorship of Delay (**App.40-41**)

My 1st amendment rights to speak for my own best interests were denied and violated by a law allowing only Kaplan to speak to the judge, which the constitution declares congress cannot enforce if it abridges the freedom of speech, which it did. Had I been allowed to speak for my best interests, instead of the court concealing facts & issues misleading jurors, Kaplan's & Shain's acts would've been revealed. Burrows v. State, Conservatorship of Delay (**App.40**).

The appellate court ruled on **App.13** Shain took advantage of summarization laws. But in 1/01 Baji 2.03 for spoila-

tion was reactivated as "illegal" in conflict with the court's ruling allowing summarization at trial in 2/01, and conflicting with the Insurance Act § 1871.4(a)(1)(**App.28-29**). In my case 8-9 dentists lost, altered, or summarized all or portions of my records without allowing me, experts, or jurors access to my complete records. Defense experts did not receive evidence proving how much Shain altered my bite, and my expert was not allowed back due to Kaplan's silence. The number of records with held or altered is demonstrative of abuse of summarization laws - allowing grand larceny by a distinct group, dentists & insurance companies. They are afforded special privileges to alter records of patients, ***after injury occurs***, to the advantage of the dentist and insurance company while negating my right to recourse when wrongly injured, *by destroying and withholding evidence*. Summarization laws in the Dental Practices Act, Health and safety Code § 1795.20 (a) allows a **health care provider to *choose* to prepare a summary of the record *rather* than allowing access to the entire record**... (**App. 28**) Summarization laws destroyed my fundamental liberty rights to a fair trial, wrongly denying compensation for medical intervention on a valid insurance claim, leaving no viable recourse in this case. Summarization laws directly conflict with the Insurance Code § 1871.4(a)(1) making it unlawful to make or cause to be made any knowingly false or fraudulent material statement of material representation for the purpose of obtaining or denying any compensation ....Suppression of evidence is just as wrong as providing false evidence if the suppression prevents jurors from knowing the truth, as in Di Sabatino v. State Bar (1980) 27 C3d 159, 162 Cal Rptr 458, 606 P2d 765; & Bus. & Prof. Code 6068 (d), (**App.41**) Summarization laws allowing dentists spoilation of direct evidence, releasing them from liability while concealing facts which ultimately may have altered the outcome of the case misleading jurors, are a dichotomy to the Constitution so how can summarization laws stand? The protection of the public's health is paramount. Isn't the purpose of a trial to arrive at the truth, rather than hide it? §1871.4(a)(1) (2) of the

Insurance Code directly conflicts with summarization laws and liberty rights to fight for ones rights in health care malpractice, making the summarization of records "illegal". If a law denies due process, or liberty, it defies the U.S. Constitution and cannot stand. The tougher restriction, restricts. California Procedure 4th Edition Vol 9 § 956 states: A decision will lose its force as a precedent if a later statute changes the rule". (**App.29**) One and half years after the trial Congress reformed six laws regarding a patient's right to access their full records on a federal level through the Health Insurance Portability and Accountability Act (HIPAA)45.CFR (which I lobbied for (**App.12-13, 27-28, 77-78**)), allowing:

§ 164.524(a)(1) ***Right of access*** to full records;§164.524 (c)(2)(ii)(A) *A summary is allowed only* ***IF*****: (A) The individual AGREES IN ADVANCE**; §164.526(a)(1) Patient's right to amend records; § 164.528 (a)(1) **Rights to accounting of disclosures**;§164.530(j)(2) **Retain records for 6 years**.

The vast number of these laws changed by HIPAA, illustrate an injured party was deprived of a fair trial based upon records. Changes universally protect everyone allowing equal protection of the laws and fair recourse in personal injury cases, to protect the health, safety, & welfare of the people in our country from reckless harm. Not publishing my appellate decision doesn't invalidate the **decision was wrong, and encourages unscrupulous repetition**. *People trust in government to set protective standards.* Reversal is warranted.

ARGUMENT TO QUESTION E.

(See brief pg19-28,47-48; reply brief pg4-5,38-42; rehearing pg13-15,23-24,42-44; CA Supreme Court pg8,21-27;App.all)

In the Appellate judge's rulings they stated many areas my attorney failed me. In **App.7**,"...in light of the fact there was no dispute at trial Shain was liable for his assistant's acts." "In their respective arguments to the jury, neither party's counsel made any direct reference to the assistant's treatment. In **App.12** they ruled, "Although Mitchell complains her attorney should have offered Baji 2.03, any error he committed in failing to do so...As a general rule...the negligence of an

attorney is imputed to the client." **App.82**, because my attorney allowed the defense to put together the Baji instructions he never discovered Baji 2.03 for spoilation was active again so he didn't try this nor give the instruction. I lost trying most of my case because he grossly failed representing me concealing this from me. Judges claim my attorney represented me vigorously on **App.12** and because I wasn't abandoned his failures were imputed to me. He fought hard all right, with **literally NO evidence, as he *concealed* he missed ALL his time lines to submit most of it, and he prevented Sperber's full opinions from ever being heard**. Not one x-ray proving how much my bite was altered made it into evidence when 3 x-rays existed(**App.87-88,76**)! I tried to tell the judges in oral argument, after late discovery, Kaplan missed his time lines to submit evidence barring so much out of the trial. The judges used some of my time I thought I had to speak in oral argument & **cut me off** before I could finish. I filed a rehearing explaining this, but they and the CA Supreme Court denied it.

In **App.13-16,** my attorney never asked my expert any questions at his deposition, & missed the 30 day stipulations he concealed from us to correct my expert's deposition (**App. 44-50,83,96-97**) nor included all of his additional points of malpractice. He missed the timing for submitting my errata corrections, too. The transcripts show the judge was only given one or two pgs of my expert's four paged errata corrections by the defense attorney (CTp93-94). Kaplan also misidentified Olmstead's x-rays dated 10/22/98 showing crown #30 ground flat by Shain, clearly proving my case and then wrongfully with drew it injuring me (**App.14,68,100-102**) (brief pgs 40-47;reply brief pgs 35-40). These photographic x-rays were submitted at Sperber's deposition with notes on them #30 was ground flat and relied upon in forming his opinions, then 2 frames were blown up for the trial. Late discovery after I filed the reply brief shows Brown notified him several weeks prior to trial he would not allow in an additional list of 20 pieces of evidence and 10 witnesses as he filed it too late (**App.44-50**), and that all errata's were filed

too late. Kaplan concealed this from me and never did an ex-parte hearing to try to continue the trial when 8 depos were taken after his nor filed motions to get the evidence in. He allowed the case to go to trial fully knowing barely any evidence was in when there was significant evidence proving how much Shain altered my bite like x-rays, study models, & photos but jurors never got to see it. His argument was I had no pain before Shain and had pain after wards with under ½ my evidence to prove it. Kaplan blamed the judge & Brown concealing his mistakes from me. Steven Freeburg's declaration lists 6 areas of Kaplan's malpractice (**App.79-81,84-86**).

Kaplan (**App.13-17**):(1) prevented my expert from giving all his opinions at his deposition, never asking any questions, allowing a partial deposition (**App.83,96-97**);(2) with held evidence; (3)barred my expert's full errata corrections; (4) missed time lines to submit evidence and witnesses (**App.44 -50**); (5) barred my expert's return in court by not telling the judge when she asked that my expert planned to return for redirect and rebuttal (**App.15-17,84-86,105**); (6) didn't subpoena records(**App.102**); (7) didn't research laws (**App.12**); (8) allowed the defense to put together the Baji instructions (**App. 82**); (9) misidentified Olmstead's x-rays **proving my case**, submitted at Sperber's depo, & with drew it (**App.14,68,100-102**); (10) didn't have my expert document the long hrs.he spent reviewing records; (11) didn't fight motions in limine preventing testimony from being heard i.e. Beymer's, establishing Sacrenty drills (**App. 89**); (12) didn't impeach false & misleading evidence when he had documents to impeach with; (13) released all records to Brown at the verdict (**App.80-81**); (14) did not keep me informed and lied to me;(15) told me if I revealed when Sacrenty's license expired the judge would declare a mistrial and I'd be arrested; (16) with held his errors throughout the motion for new trial blaming the judge & Brown for everything (**App.84-86**); (17) withheld portions of my file causing me to file briefs based on incomplete facts. Kaplan's gross misrepresentation or "ineffective assistance of counsel" (a new term I just discover-

ed), caused me to lose my case while intentionally concealing his errors. Law books say this is contempt. He refused to file a claim with his insurance who the defense also represents.

The judges blamed Kaplan for my expert not being able to return for redirect and rebuttal testimony as he raised no objection. This was damaging to me. See § 265 of Attorneys in the Board of Commrs. V. Younger (**App.41**). I've never been through a trial before, I have no law back ground, and no one ever told me I had the option to move the court for anything, nor did they tell me the real reasons none of my evidence was getting in when they had to know. **There is 12 minutes of "attorney only" side bars documented making legal decisions in my case that are not recorded, and are *secret* to this day(App. 43,96-97)**. I'd like to know what happened in those side bars. The judge refused to comment on documents submitted and allows rulings that I'm not privy to. I have no idea what documents the judge saw in deciding motion in limine #1 and #2. The court records are not what the attorneys gave the judge(**App.51-62,93-94,105-107**). United States Trust Co. V. New Jersey, " The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause ..." 1st and 14th Amendments to the Constitution (**App. 41,96-97**). If I'd been informed of his gross errors he concealed or allowed to speak to correct wrong facts misleading the court at the start I would've known the facts to correct this *before* the trial ever began, redeposed my expert, or found a new attorney. By denying my rights to speak, I have been terribly injured deferring medical treatment and prolonging litigation which could've been prevented by the judge in the first place. How was I to defend myself against things not heard or known, or fight post trial actions effectively? U.S. V LaPage (**App.38**)

CONCLUSION: this case calls for a reversal of the verdict and a fair trial in a different court with all the facts.

DATED: 11/19/03 SIGNED: Nancy Mitchell

Nancy Mitchell, In pro per

8840 Villa La Jolla Dr #214, La Jolla, Ca92037;858-271-2414

APPENDIX

(*Bold added for emphasis throughout.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, Rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or offered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

FILED, Stephen M. Kelley, Clerk

APR - 7 2003

Court of Appeal Fourth District

Nancy Mitchell, Plaintiff and Appellant v.
Gregory Shain, Defendant and Respondent.
DO38024 (Super. Ct. No. GIN001485)

(*Bold added for emphasis in the rulings.)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Guy-Schall, Judge. Affirmed.

Plaintiff and appellant Nancy Mitchell experienced temporomandibular joint disorder and myofascial pain dysfunction (collectively TMJ) following a series of dental treatments performed by defendant and respondent Greg Shain, D.D.S. At trial of her dental malpractice claim against Shain, Mitchell attempted to establish Shain's services were below the standard of care and his errors caused her TMJ. The jury returned a defense verdict. We affirm.

Although the trial court erred in failing to give an instruction with respect to Shain's responsibility for the

acts of his assistant, on this record the error was harmless. We reject Mitchell's remaining claims of instructional and procedural error.

SUMMARY

Mitchell began treating Shain in July 1998. At that time Mitchell required considerable dental work. Between August 13, 1998, and September 15, 1998, Shain prepared three of Mitchell's teeth for crowns, installed temporary crowns on them and then installed permanent crowns; in addition he performed restorative work on three other teeth. On September 5, 1998, before installation of the permanent crowns, Mitchell contacted Shain and complained of pain; Shain telephoned a pain prescription to a pharmacy. On September 8, 1998, Mitchell appeared for a visit and complained of a toothache on her lft side. Shain attributed the pain to nighttime clenching and grinding by Mitchell.

On September 15, 1998, Mitchell complainted that she woke up with pain during the night. Mitchell was also upset that day because Shain had to readjust her permanent crown. On September 16, 1998, she told Shain she was going to another dentist.

Over the following months Mitchell was treated by a number of dentists. Eventually, she was diagnosed as suffering from TMJ.

Mitchell sued Shain for malpractice and alleged that his treatment caused her TMJ. At his deposition testified that he had hip replacement surgery shortly after his treatment of Mitchell ended. He testified that before the surgery he took ibuprofen for

the pain he was suffering. He also testified that he was taking an anti-depressant and a blood pressure medication at the time treated Mitchell.

At trial Mitchell testified that the temporary crowns had been installed by Shain's dental assistant and that the assistant's work hd not been checked by Shain. She also testified that the temporary crowns were ill-fitting and that shw began experiencing pain following their installation. Mitchell also called a dental expert who testified that Shain's treatment was below the standard of care in a number of respects. Mitchell's expert believed the temporary crowns had not been properly equilibrated and that a retraction cord had been left under Mitchell's gum.. He also believed that the permanent crowns should not have been installed at the same time or on sensitive teeth and that Shain should not have worked on the opposite side of Mitchell's mouth while her teeth and jaw were sore. The expert concluded Mitchell suffered TMJ because of the treatment Shain provided.

In his defense, Shain and his assistant testified. They stated they could not recall which one of them performed the final occlusal check when the temporary crowns were installed. Shain also called two experts. His dental expert testified that his treatment of Mitchell met the standard of care under the circumstances. In particular, he stated it would not have been unusual a retraction cord was retained following restorative dentistry. Shain also called a medical expert who testified Mitchell's TMJ had existed for at least a year before Shain's treatment and had simply remained asymptomatic until after the treatment.

3

Finally, Shain put on evidence with respect to the 14 dentist Mitchell saw after her treatment with Shain stopped and the complaints she made to the dental board about them.

By a vote of nine to three, the jury found Shain had

not been negligent. Judgment was entered in his favor and Mithcell filed a timely notice of appeal.

DISCUSSION

I

By way of a motion in linime, Shain asked the trial court to preclude Mitchell from making any reference to the medical or phychiatric treatment Shain was receiving at the time he was treating Mitchell, including the medication he was taking. After confirming Mitchell's expert had no opinion with respect to whether the treatment and medications had any impact on Shain's treatment of Mitchell, the trail court granted Shain's motion. On appeal Mitchell argues she should have been able to ask Shain about the medications he was taking.

Under Evidence Code section 352, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that is admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Reasonable exercise of trial court discretion pursuant to Evidence Code 352 requires that the trial judge balance the probative value of the offered evidence against its potential of prejudice, undue consumption of time, and confusion. (Citation.) That balancing process requires consideration of the relationship between the evidence and the relevant

inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion." (*Kessler v. Gray*(1978) 77 Cal.App.3d 284, 291.)

Because there was no evidence the treatment or

medication Shain was receiving had an impact on the treatment Shain provided Mitchell, the trial court could reasonably conclude introduction into the trial of evidence about Shain's medical condition, including the medications he was taking, was not relevant to any main issue in the case and would only confuse and mislead the jury. Thus the court acted well within its discretion in granting the motion in limine.

II

Following her treatment with Shain, Mitchell discovered Shain's assistant did not have a valid license to act as a registered dental assistant at the time she participated in Mitchell's treatments. The assistant's license had been suspended for failure to pay an annual licensing fee. Shain moved in limine to prevent Mitchell form arguing that the assistant's suspended license established negligence per se. The trial court granted the motion.. As the trial court pointed out, the annual fee Shain's assistant was required to pay was not designed to protect patients and the assistant's failure to pay it would not establish negligence per se. (See *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306.) Thus the trial court did not err in limiting Mitchell's ability to establish a negligence per se theory of liability.

5

III

Next, Mitchell argues the court erred in refusing to instruct the jury with BAJI No. 6.06, which states: "Regardless of who employs or pays (a nurse)(or)(an assisting surgeon)(_____) who takes part in the performance of surgery or services incidental to such surgery, if, while engaged in any such service, (the nurse)(the assisting surgeon)(_____) is under the

direction of a certain surgeon in charge, so as to be the surgeon's temporary servant or agent, any negligence on the part of any such assisting person is the negligence of the surgeon."

Because the record shows Shain's assistant performed a significant amount of dental work on Mitchell, Shain largely concedes it was err to refuse BAJI No. 6.06. "A party is entitled upon request to correct, nonargumentative instruction on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) However, in light of the fact there was no dispute at trial Shain was liable for his assistant's acts, Shain argues the error was not prejudical. We agree with Shain: Mitchell was not prejudiced by any error in failing to give BAJI No. 6.06.

In discussing the requirement an appellant show she was prejudiced by an instructional error, the court in *Soule v. General Motors* stated: "(T)here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgement may not be reversed for

instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Citation.)....

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' (Citations.) Of course, that

determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury.

"But the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record....Thus, when decideing whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's argument, and (4) any indications by the jury itself that it was misled." (*Soule v. General Motors Corp, supra,* 8 Cal.4th at pp. 580-581, fn. omitted.)

Here the record shows Mitchell's expert testified "the doctor is responsible for the treatment no matter who does it." The record also shows Shain did not dispute this aspect of the expert's testimony and the jury was instructed it was to "determine the standard of professional learning, skill, and care required of the defendant only from the opinions of the physicians, including the defendant, who have testified as expert witnesses as to such standard." In their responsive arguments to the jury, neither party's counsel made any direct reference to the assistant's treatment. Rather, both counsel seemed to accept the notin, advanced by Mitchell's expert, Shain was responsible for his assistant's treatment. Finally, there is nothing in the record which suggests the jury was at all confused about

Shain's responsibility for his assistant's treatment. Although the jury requested a read back of the testimony of both dental experts, nothing indicates they were concerned about the assistant's treatment.

Given all these circumstances, we think there was little chance the jury was misled by the trial court's failure

to give BAJI No. 6.06. Both the record and common experience strongly suggested to the jury Shain was responsible for any treatment provided under his overall supervision. This we find no reasonable probability the absence of BAJI 6.06 affected the jury's verdict. Rather, we conclude any error in failing to give the instruction was harmless.

IV

Mitchell argues the trial court also erred in failing to instruct the jury with BAJI No.'s 6.35 and 6.36, which together provide a conditional res ipsa loquitor instruction. We find no error.

The doctrine of res ipsa loquitor is applicable when three conditions are met: "'(1) the accident (or injury) must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918.) Here, Mitchell has not established the first condition, i.e., some showing that TMJ does not occur in the absence of someone's negligence.

"'As a general rule, res ipsa loquitor applies where the occurrence of the injury is of such a nature that it can be said, in the light of past experience, that it probably was the

8

result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both on common knowledge and on expert testimony.' (Citations.) 'Since the (doctrine)...permits the jury to infer negligence from

the happening of the accident alone, there must be a basis either in common experience or expert testimony that when such an accident occurs, it is ore probably than not the result of negligence.' (Citation)" (Hale v. Venuto, supra, 137 Cal.App.3d at p. 918.)

Here, Mitchell's own expert testified there are "all sorts of views" as to the cause of TMJ and that he did not know if "anyone knows for sure" what causes the disorder. Mitchell's own expert also acknowledged a portion of the dental community does not believe malocclusion plays any role in TMJ and he agreed that in fact stress might be a component in its onset. Shain's experts agreed with Mitchell's expert about the nature of TMJ. In particular, they testified it could occur without dental malpractice and there were a wide variety of theories as to its cause.

Because the cause of TMJ is not a matter of common experience and because there was no expert testimony it occurs only as a result of dental malpractice, the trial court acted properly in refusing Mitchell's request for the conditional res ipsa loquitur instructions.

9

V

The trial court did instruct the jury with BAJI No. 6.30, which in pertinent part states: "You must determine the standard of professional learning, skill and care required of the defendant only from the opinions of the physicians (including the defendant) who have testified as expert witnesses as to that standard." Mitchell contends that the jurors were entitled to use their common knowledge in assessing the care Shain provided and that it was therefore improper to instruct with BAJI 6.30. *

(*Footnote below states: Under Code of Civil Procedure section 647, Mitchell was deemed to have taken exception to the instructions given by the trial court. This,

although Mitchell did not object to the use of BAJI 6.30, she did preserve her right to assert on appeal that the trial erred in giving it. (Lua v. Southern Pacific Transportation Co. (1992) 6 Cal.App.4th 1897, 1904-1905.))

Again, we find no error.

"Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can be established only by the testimony of experts. (Citation.)" (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86.) Admittedly, however, where "negligence on the part of the doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for determination of an obvious fact. (Citations.)" (*Ibid.*) In *Lawless v. Calaway* the court refused to apply the common knowledge exception where the plaintiff argued a physician had acted negligently in failing to X-ray a patient who died from undiagnosed appendicitis. (*Id.* At p. 89.) Unlike the use of X-rays for traumatic injuries, the court was unwilling to find "that the use of X-rays in the diagnosis of an internal abdominal ailment such as revealed by the facts in this case is so well established that the jury could have

determined, of its own knowledge, that the failure to take X-rays constituted negligence." (*Ibid.*)

Here, the principal question the jury faced was whether Shain acted negligently in putting crowns on Mitchell's teeth and then adjusting them. What the standard of care requires for such treatment on a patient such as Mitchell, who needed a great deal of dental work, is not a matter of common knowledge. Invariably, any assessment of the treatment Mitchell received required an evaluation of not only how her crowns in fact fit, but an

expert opinion as to whether both the end result and all the adjustments which took place met the standard of care.

Notwithstanding the applicability of BAJI No. 6.30 to the standard of care, Mitchell contends the jury should have been allowed to use its common sense with respect to her contention Shain's dental assistant did not have a valid dental assistant's license. As we have pointed out, the trial court did not err in preventing Mitchell from attempting to establish Shain's negligence based on the status of the assistant's license. This, that status did not undermine the need for BAJI 6.30.

Mitchell also contends the jury should have been allowed to use its common sense with respect to defense photographs which allegedly showed that she grinds her teeth. According to Mitchell, the photgraphs were fabrications. We agree with Mitchell that in determining the authenticity of the photographs the jury could use its common sense. However, nothing in BAJI 6.30 (* **Note added for clarification; 6.06 is a type-o**) prevented them from doing so. By its terms Baji No. 6.30 (***Note added for clarification; 6.06 is a type-o**.) is restricted to the standard of care required of a professional. It does not govern the authenticity of any evidence offered by the parties. Indeed, with respect to the

11

authenticity of any evidence relied upon by experts, the jury was given BAJI No. 2.40, which in pertinent part states: "An opinion is only as good as the facts and reasons on which it is based. If you find that any such fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion." In light of BAJI No. 2.40, it is clear BAJI 6.30 (*6.06 is a type-o, see pg _____ herein.) did not prevent the jury from using its common sense in determining the authenticity of the

defense photographs.

In sum then the trial court did not err in giving BAJI No. 6.06.

VI

Next, Mitchell contends the trial court should have given BAJI No. 2.03, which instructs jurors if they find a party willfully suppressed or concealed evidence, they may consider that fact in determining what inferences to draw from the evidence. However, neither party offered BAJI No. 2.03. ""In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' (Citations.)" (Citation.'" (*Null v. city of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534.)

Although Mitchell complains her attorney should have offered BAJI No. 2.03, any error he committed in failing to do so will not support reversal of the judgement obtained by Shain. "As a general rule...the negligence of an attorney is imputed to the client. (Citation.)" (*Seacall Development, Ltd. V. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-205.) Only when an attorney has completely abandoned a client will a court relieve the client from her attorney's errors. (*Ibid.*) Here, although Mitchell

12

may be unhappy with the result her attorney obtained, the record shows her counsel represented her vigorously throughout the trial. Thus, because Mitchell was in no sense abandoned, the failure to request a concealment instruction must be imputed to Mitchell. (*Ibid.*)

VII

For similar reasons we cannot reach Mitchell's contention Health and Safety Code section 1795.20 is

unconstitutional.

Health and Safety Code section 1795.20 permits a health care provider to prepare a summary of a patient's record rather than permit the patient access to the patient's entire record. Shain in fact took advantage of the statute and prepared for Mitchell a summary of her dental records. On appeal Mitchell contends that this violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. However, Mitchell did not raise this contention at trial and Shain had no opportunity to defend the constitutionality of the statute. Thus Mitchell may not challenge the statute for the first time on appeal. (See *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876.)

VIII

During discovery, Mitchell's dental expert was deposed and he was asked to disclose all of his opinions and the bases for those opinions. Following his deposition, the expert reviewed the deposition and made a number of changes to it. In light of the changes, Mitchell offered to make the expert available for a follow-up deposition. Shain declined the offer for a follow-up deposition.

13

At the commencement of trial, Shain moved in limine to limit testimony from Mitchell's expert to the opinions and bases for opinions disclosed at the expert's deposition. Mitchell opposed the motion on the grounds that in light of the changes the expert made to the deposition, Shain should have conducted a follow-up deposition. After reviewing the deposition, and the changes that the expert made to it, the trial court granted the motion in limine. In particular, the court found the changes did not add to or alter the essence of the opinions

disclosed at the deposition.

During the trial, Mitchell's expert attempted to support his theory Mitchell's crown had not been adjusted properly by referring to X-rays a third dentist had taken of Mitchell's teeth. Shain objected to the testimony because the expert had not relied upon the x-rays at his deposition as a basis for any of his opinions. In response to the objection, Mitchell's expert stated: "If it wasn't included as a basis, then I would withdraw that." The trial court then instructed the jury to disregard the X-ray testimony.

On appeal, Mitchell challenges the trial court's ruling on the X-ray testimony. The first difficulty she must overcome, of course, is the fact that the record shows her attorney withdrew the testimony. Under the doctrine of invited error, she may not rely on appeal on a ruling she asked for in the trial court. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

Secondly, even if her counsel's request to withdraw the X-ray testimony is interpreted as mere acquiescence in the trial court's earlier adverse ruling on Shain's in limine motion, as to the X-rays the earlier ruling was clearly correct and Shain's objection to use of the X-ray would have been properly sustained in any event. In particular,

nothing in the changes her expert made in his deposition alerted Shain to the fact that following his deposition the expert had considered X-rays from a third dentist and had drawn conclusions about Mitchell's occlusion from them. This, nothing in the changes would have given Shain a reasonable opportunity to conduct further discovery with respect to the X-rays. Accordingly, the expert's trial testimony about the X-rays was governed by the general rule: "When an expert deponent testifies as to specific

opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (Jones v. Moore (2000) 80 Cal.App.4th 557, 565.)

IX

We reject Mitchell's contention the trial court abused its discretion in failing to extend the trial to permit her expert to offer rebuttal testimony.

On the afternoon of Tuesday, February 13, 2001, after the jury had been excused for the evening, the trial judge discussed with counsel the schedule for the remainder of the trial. At that point the defense was nearing completion of its case. After instructing counsel to prepare a list of exhibits that could be entered by way of stipulation, as well as agreed jury instructions, the trial judge told counsel: "We will be recessing at 4:15 tomorrow to go through, finalize things. So make sure you have witnesses ready to go because wherever we are, at 4:15, everyone will be resting." Mitchell's counsel raised no objection to the trial judge's plan to finish taking evidence in the case the following day.

On the following day, during the morning recess, the trial judge again spoke with counsel about the trial schedule. After discussing with counsel the remaining witnesses

and the need to conclude the evidence portion of the trial by 4:15 that day, Mitchell's counsel stated: "Your Honor, on rebuttal, I have – (our expert) is out of town. I had scheduled him for the morning the first thing on rebuttal."

In response to this statement, the trial judge stated: "That was improper, Counsel. I told you we would be finishing at 4:15. If you mean the morning Thursday

morning, I cannot accommodate you, and I won't. I've got five trials I am dealing with at 8:30 tomorrow morning. And I need to make sure I deal with them.

"This is complete news to me, Mr. Kaplan. You should have advised me of it yesterday. So that is denied.

"I'm not going to be going with the case into Thursday morning. You all give me estimates. We are now over those estimates. And I expect us to be done at 4:15 today."

In limiting the witnesses, the trial judge acted well within her discretion in controlling the proceedings before her. It is axiomatic "courts have inherent equity, supervisory and administrative powers (citations) as well as inherent power to control litigation before them." (*Cottle v. Superior Court* (1992) 3 Ca.App.4th 1367, 1377; see also Code Civ. Proc., section 128, subd. (A)(3) (power to provide for orderly conduct of proceedings).) Here, there can be no doubt the trial judge's inherent power to control the proceedings before her included the power to require the parties give her estimates of how much time they needed to present their respective cases. Absent unusual circumstances, the trial judge also had the right to rely on those estimates.. The record shows on February 13, relying on counsel's representations of how long they needed to finish their cases, the trial court advised the parties the evidentiary portion of the trial

would conclude at 4:15 p.m. on February 14. Mitchell's counsel did not advise the court he would need additional time because he needed to call his expert in rebuttal and his expert would not be available until February 15. When, on the following morning counsel finally advised the court about his need for extra time, the trial court did not act unreasonably in finding he should have brought the

issue up earlier when the trial court would have had greater ability to adjust its calendar commitments. Thus, the trial court did not abuse its discretion in limiting the evidentiary portion of the trial.

X

In support of her motion for a new trial, Mitchell submitted the affidavit of a juror who stated "there was a juror who simply was scolded by another juror for simply just not listening to anything, he had make up his mind when we walked in, but I'm not sure it would have made any difference." Mitchell attempted to corroborate this juror's statement with the declaration of her investigator who related his conversation with yet another juror to the effect on of the jurors was closed minded and refused to look at the evidence.

Contrary to Mitchell's contention on appeal, neither the juror's affidavit nor the investigator's declaration set forth facts which, even if established, amount to juror misconduct. "(A) party's right to have his case decided by a jury does not necessarily include the right to compel jurors to discuss what they have chosen to decide without discussion.....(Citation.).... (¶)"Code of Civil Procedure section 613 states: 'When the case is finally submitted to the jury, they may decide in Court or retire for deliberation....' This statute does not require that the jurors deliberate with each other.

Instead, deliberation may be done on an individual basis. (Citation.)" (*People v. Bowers* (2001) 87 Cal.App.4th 722, 734, 735; accord *Mendoza v. Club car, Inc.* (2000) 81 Cal.App.4th 287, 310-311; *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 912.) This the juror who refused to discuss his views did not commit any misconduct.

Judgment affirmed. Respondent to recover his costs of appeal.

"s/ Benke", Benke, acting P.J.

WE CONCUR:

"s/Haller", Haller, J.

"s/O'Rourke", O'Rourke, J.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

FILED, Stephen M. Kelley, Clerk
MAY - 1 - 2003
Court of Appeal Fourth District

Nancy Mitchell, Plaintiff and Appellant v.
Gregory Shain, Defendant and Respondent.
DO38024 (Super. Ct. No. GIN001485)

THE COURT:
The petition for rehearing is denied.

"s/Benke", Benke, Acting P.J.
Copies to: All parties

Court of Appeal, Fourth Appellate District, Division One - No. DO38024
S116048

IN THE **SUPREME COURT OF CALIFORNIA**
En Banc

Nancy Mitchell, Plaintiff and Appellant,
v.
Greg Shain, Defendant and Respondent.

Petition for review DENIED.

George, C.J. was absent and did not participate.

SUPREME COURT FILED
JUN 25 2003
Frederick K. Ohlrich Clerk
DEPUTY

"stamped/ KENNARD, J."
Acting Chief Justice

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, Division One
San Diego County Superior Court
P.O. Box 2724
San Diego, CA 92112
RE: NANCY MITCHELL
Plaintiff and Appellant
V.
GREG SHAIN,
Defendant and Respondent
DO38024
San Diego County No. GIN001485
*** REMITTITUR***

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled case on April 7, 2003, and that his opinion or decision has now become final.

____Appellant _____Respondent to recover costs.
____ Each party to bear own costs.
____ Costs are not awared in this proceeding.
_X_ Other (See Below)

Respondent to recover his costs on appeal.
Witness my hand and the seal of the Court affixed this **July 1, 2003.** (Something is crossed out in ink and the date of July 1, 2003 is hand written on the document above it.)
Stephen M. Kelly Clerk, By: "s/Scott Busskohl", Deputy Clerk
cc: All Parties (Copy of remittitur only, Cal. Rules of Court, rule 26(d))
Seal: Court of Appeal, State of California, Fourth Appellate District.

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

FILED
Stephen M. Kelly Clerk
FEB 11 2003
Court of Appeal Fourth District

NANCY MITCHELL, Plaintiff and Appellant, v.
GREG SHAIN, Defendant and Respondent
DO38024, San Diego County No. GIN001485

THE COURT:

Appellant's Request for Additional Time for Oral Argument received on February 7, 2003 requesting additional time for oral argument is DENIED. Oral argument will be limited to 15 minutes per side.

"s/Benke", Acting Presiding Justice

cc: All Parties

Court of Appeal, State of California
FOURTH APPELLATE DISTRICT, Division One
750 B Street, Suite 300
San Diego, CA 92101-8196
(619) 645-2760
October 15, 2001

RE: NANCY MITCHELL, Plaintiff and Appellant, v.
GREG SHAIN, Defendant and Respondent
DO38024, San Diego County No. GIN001485

Dear Mr. Brown:

The court has received your "Notice of Lodgment of Exhibits" with one exhibit and portions of three others attached. This is an insufficient response to the court's order.

Please provide the court with the remaining exhibits in full or an item by item explanation as to why the item is not available. If particular item is not in your possession, include its present location and the reason why you have not sought to provide it for the court.

Your response should be filed with the court no later than 10 days from the date of this letter.

Stephen M. Kelly, Clerk
By: "s/Scott Busskohl"
Deputy Clerk

cc: All Parties

(From page 12 herein:)(*NOTE: All italics and bold lettering added for emphasis in all the following statutes:)

*California Code of Regulations, Dental Practices Act,Business and Professions Code, Chapter 4, Consumer Affairs section 301, Legislative Intent, "It is the **intent of the Legislature and the purpose** of this chapter **to promote and protect the interests of the people** as consumers. The legislature finds that vigorous representation and protection of consumer interests are essential to the fair and efficient functioning of a free enterprise market economy. The legislature declares that government advances the interests of consumers by facilitating the proper functioning of the free market enterprise economy through...(b) **protecting the consumer from** the sale of goods or services through the use of deceptive methods, **acts, or practices which are inimical to the general welfare of consumers**."

*California Code of Regulations, Dental Practices Act, Business and Professions Code section 145(a)(b) states, " The legislature finds and declares that: (a) **Unlicensed activity** in the professions and vocations regulated by the Department of Consumer Affairs is a **threat to the health, welfare, and safety of the people** of the State of California. (b) The law enforcement agencies of the state should have sufficient, effective, and responsible means available to enforce the licensing laws of the state."

In the Dental Practices Act, Business and Professions Code,

Article 2, section 1626 states, "It is **unlawful** for any person to engage in the practice of dentistry in the

state, either privately or as an employee of a governmental agency or political subdivision, **unless the person has a valid, unexpired license** or a special permit from the board."

In the Dental Practices Act, Business and Professions Code, Article 2, section 1625(b)states, "...a person practices dentistry who does any one or more of the following: (b) **Performs** or offers to perform an **operation or diagnosis** of any kind, or treats diseases or lesions of the human teeth, alveolar process, gums, jaws, or **associated structures or corrects malposed positions thereof**;" (which the assistant did).

In the Dental Practices Act, Business and Professions Code section 1680 (c) (y)(cc)(ee) it states:

Unprofessional conduct by a person licensed under this chapter is defined as, but is not limited to, the violation of any one of the following: (c) The **aiding or abetting of any unlicensed person to practice dentistry**; (y) the aiding or abetting of a licensed dentist or dental auxiliary to practice dentistry in a negligent or incompetent manner; (cc) Engaging in the practice of dentistry with an expired license; (ee)The utilization by a licensed dentist of any person to perform the functions of a RDA, RDA in extended functions, RDH, or RDH in extended functions who, at the time of initial employment does not possess a current, valid license to perform those functions.

Dental Practices Act, Business and Professions Code, Title 16, Article 5, section 1085 (a)(3)(7) states: Unless specifically so provided by regulation, **a dental assistant may not** perform the following functions or any other activity which represents the practice

of dentistry or requires the knowledge, skill and training of a licensed dentist: (3) **Fitting and adjusting of correctional and prosthodontic appliances**; (7) **Taking of impressions** for prosthodontic appliances, bridges, or any other structures which may be worn in the mouth. *The assistant performed all of these.

California Code of Regulations, Dental Practices Act, Business and Professions Code 1764 states:"Any person other than one who has been issued a license by the board who hold himself out as a RDA, or a RDA in extended functions, or a RDH, or a RDH in extended functions, or uses any other term **indicating or implying he is licensed** by the board in the aforementioned categories, is **guilty of a misdemeanor**".

California Code of Regulations, Dental Practices Act, Chapter 4, Continuing Education, section 1017(a)(3): As a condition to renewal of a license issued by the board, every licentiate shall accumulate the minimum number of units indicated below during the biennial license renewal period and shall assure the board that he/she will accumulate such units during the succeeding two year renewal period;...As part of the continuing education requirements, each licentiate shall complete, at least once every two years, a course in *basis life support* approved by the American Red Cross or the American Heart Association.; (3) Registered Dental Assistants **(RDA): 25 units**. (Required to renew a license)

(From pages 31-32 herein)(*NOTE: All italics and bold lettering added for emphasis in the following statutes:) Health Insurance Portability and Accountability Act (HIPAA) 45.CFR(which I lobbied for (App.77-78)), allowing patients:

> § 164.524(a)(1) Standard: *access to protected health information. (1)* ***Right of access***. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this §, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated records set...; § 164.524(c)(2)(i) *Form of access requested.* The covered entity must provide the individual with **access to the protected health information in the form or format requested** by the individual, if it is readily producible in such form or format; or, if not, in a readable hard copy form or such other form or format as agreed to by the covered entity and the individual; § 164.524(c)(2)(ii)(A) The covered entity *may provide the individual with a summary* of the protected health information requested, in lieu of a providing access to the protected health information or may provide an explanation of the protected health information to which assess has been provided, ***IF*: (A) The individual AGREES IN ADVANCE to such a summary** or explanation...; § 164.526(a)(1) Standard: right to amend. (1)Right to amend. An individual has the right to have a covered entity amend protected health information or a record about the individual in a designated record set for as long as the protected health information is maintained in the

designated record set; § 164.528 (a)(1) Standard: **a right of accounting of disclosures** of protected health information. (1) An individual has **a right to receive an accounting of disclosures** of protected health information made by a covered entity in the six years prior to the date on which the accounting is requested...; § 164.530(j)(2) Standard: Documentation. A covered entity must: (2) Implementation specification: retention period. A covered entity **must retain the documentation required by paragraph(j)(1) of this § for six years** from the date of its creation or the date when it last was in effect, which ever is later.

(From page 29 herein:)(***NOTE: All italics and bold lettering added for emphasis** in the following statutes:)
Dental Practices Act, Health and safety Code § 1795.20 (a) states: A health care provider may provide a summary of the record, according to the requirements of this §, for inspection and copying by a patient. **If the health care provider *chooses* to prepare a summary of the record *rather* than allowing access to the entire record,** he or she shall make the summary of the record available to the patient within 10 working days from the date of the patient's request....

(From page 30 herein;)(*NOTE: All bold lettering added for emphasis in the following statute:)
Insurance Code § 1871.4(a)(1) which makes it:
...**Unlawful to make or cause to be made any knowingly false or fraudulent material statement of material representation for the purpose of** obtaining or **denying any compensation,** as defined in § 3207 of the Labor Code.

(From page 28 herein;)
California Procedure 4th Edition Vol 9 § 956 states: "

> A decision correct when rendered will, of course, lose its force as a precedent if a later statute changes the rule". (126 C. 1208)

BAJI's (JURY INSTRUCTIONS)

(From page 20 herein:)
Baji 2.02: "If weaker and less satisfactory evidence is offered by a party, when it was within such party's ability to produce stronger & more satisfactory evidence, the evidence offered should be viewed with distrust".

(From pages 25 & 28 herein:)
Baji 2.03: Willful Suppression of Evidence. If you find that a party willfully (suppressed), (altered), (damaged), (concealed), and (destroyed) evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence.

Comment. This 2001 revision broadens the application of this instruction to include acts of spoilation or alteration of evidence.

(*Use Note): For mere failure to produce available stronger evidence, use BAJI 2.02.

(From page 20 herein:)
Baji 2.04 : "In determining what inferences to draw from the evidence, you may consider, among other things a party's failure to explain or to deny such evidence".

(From page 20 herein:)

Baji 2.40: Expert testimony- - Qualifications of expert. Witnesses who have special knowledge, skill, experience, training or education in a particular subject have testified to certain opinions. Any such witness is referred to as an expert witness. In determining what weight to give any such opinion, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.

An opinion is only as good as the facts and reasons on which it is based. If you find that any such fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

You are not bound by an opinion. Give each opinion the weight you find it deserves.

(From pages 23 herein:)
Baji 6.00.1: Duty of Dentist. In performing professional services for a patient, a dentist has the duty to have that degree of learning and skill ordinarily possessed by reputable dentists, practicing in the sam or a similar locality and under similar circumstances.

The further duty of the dentist is to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of skill and application of learning, in an effort to accomplish the purpose for which the physician is employed.

A failure to fulfill any such duty is negligence.

(From page 17 herein:)
Baji 6.02: Dental perfection not required. A dentist is not necessarily negligent because he errs in judgement or because his efforts prove unsuccessful. A dentist is negligent if the error in judgement or lack of success is due to a failure to perform any of the duties as defined in these instructions.

(From page 19, 20, & 21 herein:)
Baji 6.06: Liability of Surgeon for Negligence of Assistants and Nurses. Regardless of who employs or pays (a nurse) (or) (an assisting surgeon) who takes part in the performance of surgery or services incidental to such surgery, if, while engaged in any such service, (the assisting surgeon) (the nurse) is under the direction of a certain surgeon in charge, so as to be the surgeon's temporary servant of agent, any negligence on the part of any such assisting person, occurring while the latter is under the surgeon's direction, is deemed in law to be the negligence of such surgeon.

(From pages 16, 18, 20, 21 & 22 herein:)
Informed Consent, Baji 6.11: Liability of Consent - Physician's Duty of Disclosure. Except as hereinafter explained, it is the duty of the physician to disclose to the patient all material information to enable the patient to make and informed decision regarding the proposed operation or treatment.

Material information is information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure. To be material a fact must also be one which is not commonly appreciated.

There is no duty to make disclosure of risks when the patient requests that (he) (or) (she) not be so informed or where the procedure is simple and the danger remote and commonly understood to be remote.

Likewise, there is no duty to discuss minor risks inherent in common procedures, when such procedures very seldom result in serious ill effects.

However, when a procedure inherently involves a known risk of death or serious bodily harm it is the physician's duty to disclose to the patient the possibility of such outcome and to explain in lay terms the complications that might possibly occur. (The physician or surgeon must also disclose such additional information as would be called for by the standard of skill and care required of the defendant under the same or similar circumstances.)

(A physician has no duty of disclosure beyond that called for by the standard of skill and care requried of the defendant under circumstances when (he)(or)(she) relied upon facts which would demonstrate to a reasonable person that the disclosure would so seriously upset the patient that the patient would not have been able to rationally weigh the risks of refusing to undergo the recommended (treatment)(operation).)

Even though the patient has consented to a proposed treatment or operation, the **failure of the physician to inform the patient as stated in this instruction before obtaining such consent is negligence. This negligence renders the physician subject to liability for any injury caused by the (treatment)(operation) if a reasonably prudent person in the patient's position would not have consented to the (treatment)(operation) if (he)(or)(she) had been adequately informed of all the significant perils(.)** (, unless the patient would have consented even though a reasonable person would not have done so.)

(From pages 17, 19, 20, & 22 herein:)
Baji 6.30: Dental Negligence - Standard of care determined by expert testimony. You must determine the standard of professional learning, skill and care required of the defendant only from the opinions of the physicians including the defendant who have testified as expert witnesses as to such standard.

You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for this opinion. Give each opinion the with to which you deem it entitled.

You must resolve any conflict in the testimony of the witnesses by weighing each of the opinions expressed against the others, taking into consideration the reasons given for the opinion, the facts relied upon by the witness, and the relative credibility, special knowledge, skill, experience, training and education of the witness.

(*Use Note) **If the standard of care is a matter of common knowledge, this instruction should not be given.** In such case, if expert witnesses testify, Instructions 2.40 and 2.41 may be used.

(From page 21, 22 herein:)
Baji 6.35: Medical Negligence - Conditional Res Ipsa Loquitur. You must decide the following question(s) concerning the injury involved in this case:

Is it the kind of injury which ordinarily does not occur in the absence of negligence?

(Whether the injury is one which ordinarily does not occur in the absence of negligence is to be determined from the evidence presented in this trial by physicians and surgeons called as expert witnesses.)

Was the injury caused while the plaintiff was

exclusively under the care or control of the defendant(s)? (The plaintiff is not required to identify the particular agency or instrumentality which caused the injury if he is unable to do so because of his physical condition at the time the (medication, treatment, operation) was (administered)(performed).)

Was the injury due to any voluntary action or contribution on the part of the palintiff which was the (proximate)(legal) cause of the injury?

If, and only if, you find that the plaintiff's injury was of a kind which ordinarily does not occur in the absence of negligence; that it was caused while the plaintiff was exclusively under the care or control of defendant(s); and that it was not due to any voluntary action or contribution by the plaintiff which was the (proximate) (legal) cause of the injury, you are instructed as follows:

(*Excerpts of Use Notes) If there is an issue whether the treatment administered by the defendant was a proximate or **legal cause** of the injury complained of, Instruction 6.36 should be given as a preliminary to this instruction.

*See Comment to Instruction 6.30 for examples of common knowledge upon which res ipsa loquitur may be predicated.

*It is suggested that, in cases in which the plaintiff seeks recovery of damages not only on a claim of malpractice in treating and operating but also on a claim of defendant's failure to secure an informed consent to the treatment or operation, Instruction 6.35 be preceded by the following: "Except as to the claim of the defendant's failure to disclose all relevant information necessary for the plaintiff to make an informed decision regarding the proposed (treatment)(operation), you are instructed that:"

(From pages 21- 22 herein:)
Baji 6.36: Medical Negligence - Necessity of Causal Relation Between Treatment and Injury - Res Ipsa Loquitur.

In this case, it is hour duty to determine first whether the (injury)(condition) for which plaintiff seeks to recover damages was (proximately)(legally) caused by ___ (administered)(performed) by the defendant(s) ____.

If you find that such (medication) (treatment) (operation) was not a (proximate)(legal) cause of any injury to plaintiff, then you will find against the plaintiff and in favor of the defendant(s) _____. On the other hand, if you find that plaintiff's (injury)(condition) was (proximately) (legally) caused by such (medication) (treatment) (operation) (administered) (performed) by (any one or more of) the defendant(s), then your are further instructed as to (that)(those) particular defendant(s) that:

(Use Note) This instruction , if given, must be immediately followed by Instruction 6.35.

(From pg. 10 herein:)
California Teachers Ass'n v. State Bd. Of Education(9th Cir 2001): The court of appeals is not authorized to re-write a state statute so it will pass constitutional muster".
"(17.statutes key 47) Uncertainty at a statutes margins will not warrant facial invalidation if it is clear what the statute proscribes in the vast majority of its intended applications U.S.C.A. Const. Amends. 1, 14."

(From pg. 10 herein:)
Alferitz v. Borgwardt. "Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the laws. It simply applies to

the controversy the law as it exists when the alleged rights or liabilities accrued". "Courts have never thought themselves bound by it as they are by a valid statute..." Section 956 states: " A decision correct when rendered will, of course, lose its force as a precedent if a later statute changes the rule". (126 C. 1208)

(From pg. 11 herein:)
Daum v. Spine Care Medical Group, Inc. (1997). Page 1318 "...it seems likely the instructions made it easy for the jury to decide in Spine Care's favor based on an erroneous legal standard regarding the duty of disclosure to patient's in clinical trials." "Instead of being able to try the case based on the statutes and regulations governing clinical trials, the Daums were forced to engage in a battle of experts over the duty of disclosure. The jury resolved this dispute based upon erroneous instructions. Prejudice will generally be found when the jury's verdict was probably based on erroneous instructions".

(From page 16 herein:)
US Sup. Ct. Digest US Mo. 1990 in Cruzan by Cruzan v. Director, Missouri Dept. Of Health: "Constitutional Law Section 528.5: Pursuant to the Federal Constitution's 14th Amendment, a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."

(From page 16 herein:)
City of Pasadena v. AT & T Communications of California, Inc reversed the judgement and on pg 276 statutes 3,4, & 6 states, "The courts apply a plain meaning rule when interpreting words contained in legislative enactments."

"When the words are unambiguous, courts presume the lawmakers meant what they said." "The courts may not under the guise of statutory construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used".

(From page 16 herein:
California Jurisprudence 3D 2003 Cumulative Supplement of Constitutional Law section 138:U.S. Constitution Article 6 cl. 2. PTI, Inc. v. Phillip Morris Inc., "State legislation of health and safety matters is presumed constitutional under the Supremacy Clause; the presumption may only be overcome by a showing that preemption was the clear and manifest purpose of Congress".

(From page 16 herein:)
Code of Civil Procedure section 1858, Construing Statute - Interpolation Forbidden: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all".

(From page 16 herein:)
Code of Civil Procedure section 1859: "In the construction of a state the intention of the legislature, and in the construction of the instrument the intention of the parties is to be pursued, if possible; and when a general and a particular provision are inconsistent, the later is paramount to the former. So a particular intent will control a general one that is inconsistent with it".

(From page 18, 21, & 30 herein:)(*NOTE: Bold lettering added for emphasis in the following:)
U.S. V. LaPage(9th Cir. 2000) the court ruled "...the Supreme Court made it clear that "**a conviction obtained through the use of false evidence known to be such by representatives of the State, must fall under the Fourteenth Amendment." "The same result obtains when the State although not soliciting false evidence allows it to go uncorrected when it appears**." The court explained that this principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness." Rather, "**a lie is a lie, no matter what the subject." Because the use of known lies to get a conviction deprives a defendant of his constitutional right to due process of law, we must reverse** LaPage's conviction unless Manes's false testimony was "harmless beyond a reasonable doubt." That is, we must reverse "if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury." Pg 492, (6,7) "**All perjury pollutes a trial, making it hard for jurors to see the truth**". The verdict was reversed as failure to correct proseeutorial testimony known to be false may have made a difference to the outcome of the case, so the conviction cannot stand.

(From pages 21- 22 herein:)
Ng v. Hudson (1977)"...it is inherently prejudicial error for a trial court to refuse to give instructions covering each party's theories of the case which are supported by the pleadings and the evidence... If there was evidence of contributory negligence, and we have held that there was, even though the trial court thought it was slight as compared to the evidence of negligence of the defendants, then such error in refusing to give the proffered instructions obviously

and necessarily was prejudicial. The trial judge had no legal right to weigh the conflicting evidence by refusing the instructions. When he did so the defendants were denied their constitutional right to a jury trial on the issue. (Phillips v. G. L. Truman Excavation Co.,).

(From page 24 herein:)
US Supreme Court Reports, Giaccio v. Pennsylvania "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and *(382 US 403) jurors free to *decide, without any legally fixed standards, what is prohibited and what is not in each particular case"(See Lanzetta v New Jersey). "Certainly one of the basic purposes of the Due Process Cause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."

(From page 24 herein:)(*NOTE: Bold lettering added for emphasis in the following:)
Stahlin v. Hilton Hotels Corporation...the **unlicensed nurse was permitted to use her own judgement** without the benefit of instructions by the doctor or his review **and was sufficient to present a jury question if the doctor was negligent in authorizing an employee to perform diagnostic and treatment activities performable under state law by only licensed physicians.** Pg 585, ...the court ruled **the acts of the unlicensed assistant fell within the statutory prohibitions and jurors should have been permitted to weigh if delegating duties to her**

constituted negligence. Judgement was reversed and remanded for new trial as to the Dr.'s liability.

(From page 24 herein:)
Burkhart v. Randles quoting Haislah v. Walton,"...the instructions to the jury on this claim failed to adequately present the issues of the case or the applicable law, the district court committed reversible error." This same error was made in my case. McGee v Cessna Aircraft Co. (1978) was reversed as the jury had been erroneously instructed and a judgement obtained based upon a wrong application of law cannot stand.

(From pages 24-25 herein:)
People V. Cameron states;...the constitutionality of a statute goes to the jurisdiction of the court it is an issue which may be raised on appeal and appellate counsel has properly raised it. It is an issue which goes to the heart of this appeal..." "The issue of the constitutionality of a statute may be raised on appeal even though it was not raised at trial." (Cal.Jur.3d, Constitutional Law section 61;Am.Jur.2d, Constitutional Law§115)

(From page 25 herein:)
Burrows v. State;..a stipulation to an erroneous legal conclusion does not bind the appellate court.
Conservatorship of Delay; Constitutional issues may be raised for the first time on appeal.

(From page 25 herein:)
People V. Cameron defendant was denied effective assistance of counsel because his counsel did not raise the issue as to the constitutionality of ...therefore he is barred from rising the issue on appeal ... The argument is

fallacious. Since the constitutionality of a statute goes to the jurisdiction of the court it is an issue which may be raised on appeal and appellate counsel has properly raised it... Exceptions to the rule have been granted widely in Civ. Serv. Employees Ins. Co. V. Sup. Ct.; California Pools, Inc. V. Pazargad; Morrison v State Bd. Of Educ. Supra; Ward v. Taggart; Powell v. Premier Ins. Co; Monterey Club v. Sup. Ct..

(From page 26 herein;)
Di Sabatino v. State Bar (1980) 27 C3d 159, 162 Cal Rptr 458, 606 P2d 765; & Bus. & Prof. Code 6068 (d), which unqualifiedly requires an attorney to refrain from acts that mislead or deceive the court. Concealment of material facts is just as misleading as explicit false statements, and, accordingly, is misconduct calling for discipline.

(From pages 21 & 30 herein:)
1st Amendment to the Constitution promises "... the congress shall make no law abridging the freedom of speech (to reduce the length of, condense, or shorten) or of the press;...or the right of the people to petition the government for a redress of grievances." The 14th Amendment to the Constitution states, "... no state shall make or enforce any law which shall abridge the privileges (or immunities) of citizens of the U.S.; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws".

(From pages 30 herein:)
§ 265 of Attorneys in the Board of Commrs. V. Younger states, "So long as he remains the attorney of record the court cannot recognize any other as having the management

of the case. If the party for any cause becomes dissatisfied with his attorney the law points out a remedy. He may move the court for leave to change his attorney..."

(From page 15 herein;)
Brooks v. Wilson, 98 Ohio App. 3d 301, 307, 648 N.E.2d 552, 556(Oh.Ct. App 1994): (summarized)appeal not allowed by Defendant dentist; Brooks v Wilson, 71 Ohio St. 3d 1494, 646 N.E.2d 469 (1994). A damage award for $1.5 million in a dental malpractice action was affirmed. The dentist's repeated efforts to fit crowns on three of the patient's teeth allegedly caused her TMJ disfunction. The jury properly considered the issue of future damages, and the patient testified to her continuing pain. Several treating practitioners testified to their treatment for that pain and its causes. This included one dentist who testified that about 75 to 80 % of TMJ is caused by a person's bite being altered.

(Clerk's Record pg. No.) 000588 (*NOTE: Bold letters added for emphasis in the following:)
Nancy Mitchell vs. Greg Shain, D.B.S.
Case Number GIN001485, **February 8, 2001**, Page 2

10:20 a.m	Court, counsel, and parties are present in court, outside the presence of the jury. Court and counsel confer, as reported.
10:25 a.m.	The jury is now present. **Nancy Mitchell**, previously sworn, resumes the witness stand. Redirect examination by Attorney Kaplan continues.
10:37 a.m.	Court and counsel confer at side bar, as

reported (three minutes).

10:40 a.m. **Gregory Shain** is sworn. Examination by Attorney Kaplan, pursuant to Evidence Code section 776.

10:41 a.m. **Court and counsel confer at side bar, not reported (four minutes).**

10:45 a.m. Examination by Attorney Kaplan continues. The following premarked exhibits are identified:

1. Records-Gregory Shain , D.D.S. (Page 6)
1. Records-Gregory Shain , D.D.S. (Page 10)

11:45 a.m. Examination by Attorney Brown.

12:00 p.m. The jury is admonished and excused. Court remains in sessin, outside the presence of the jury. Court and counsel confer regarding scheduling, as reported.

12:02 p.m. Court is in recess.

1:35 p.m. Court, counsel, parties, and the jury are present in court. Court reconvenes. **Denise Sacrenty** is sworn (**taken out of order**). Examination by Attorney Brown.

The following premarked exhibits are identified:

1. Records - Gregory Shain, D.D.S. (Page 5)
1. Records - Gregory Shain, D.D.S. (Page 7)

2:00 p.m. Cross examination by Attorney Kaplan.

2:43 p.m. The jury is admonished and excused. Court is in recess.

Continued....

MICHAEL A. KAPLAN, ATTORNEY AT LAW
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CALIFORNIA 92122-2489
(858) 453-6122 . FAX (858) 453-2155
e-mail:mjkaplan@cts.com

January 16, 2001

Courtney R. Miklusak, Esq.
Neil, Dymott, Perkins, Brown & Frank
1010 Second Ave, Suite 2500
San Diego, CA 92101
By fax to: (619) 238-1562

Re: Mitchell v. Shain

Dear Ms. Miklusak:

In advance of the court's Trial Readiness Conference on Friday, I anticipate that your office will be able to finalize the report for the court. If so, would you please amend the prior report to include the following additional components:

A. Additional witnesses

Alan Mallinger, M.D.
Karin Morlan Lysek
James McKinley
Dr. Tim Massaret
Martha DeJulius
Jan Reese
Jan Ford
Ruth Ford
Debbie Beymer
Janet Neuman

B. Additional Exhibits

- Plaintiff's checks/statements for dental care;
- Plaintiff's medication bottles

- Articulating paper;
- Plaintiff's summary of documentary evidence re monetary damages;
- Article: Mt Sinai Medical Center Family Guide to Dental Health;
- Defendant's business card;
- Defendant's newspaper ad;
- Department of Consumer Affairs letter of 5/11/99 re: Ms. Sacrenty;

B. Additional Exhibits (con't)
- Chart of numbered teeth;
- Plaintiff's symptoms/effects chart;
- TMJ MR chart;
- TMJ anatomy chart;
- Prescription warning/side effects of Klonopin;
- Statement of damages of Plaintiff in SDSC #GIN004958;
- Plaintiff's MRI report;
- Debra Beymer's letters;
- Chart #2 re Plaintiff's treatment;
- Plaintiff's chart re teeth complaints;
- Model of skull

C. Special Jury Instructions
- Section 1680 of Business and Professions Code

Please note further that Dr. Sperber will have additional opinions regarding the reasonableness and necessity of Plaintiff's subsequent dental treatment. An additional basis for Dr. Sperber's opinion is the Mount Sinai Medical Center Family Guide to Dental health noted as an exhibit supra. Should your office wish to further

depose Dr. Sperber, we will waive any statutory notice provisions, and he would be available at a mutually convenient time prior to trial.

Lastly, we had spoken in the past regarding the parties' ability to stipulate to the dental records and billings by the various providers. May we also stipulate to the department of Consumer Affairs letter of May 11, 1999 regarding the license suspension of Ms. Sacrenty?

Should I not hear form you to the contrary, I will assume that the foregoing requests will be acceptable to you, and I will look forward to seeing you or Mr. Brown at the Trial Readiness conference.

Thank you for your ongoing assistance and courtesy in this matter.

Sincerely,
"s/Michael A. Kaplan"
Michael A. Kaplan

NEIL, DYMOTT, PERKINS, BROWN & FRANK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1010 SECOND AVENUE, SUITE 2500
SAN DIEGO, CALIFORNIA 92101-4906
TELEPHONE (619) 238-1712, FAX (619) 238-1562
E-mail address dbrown@neil-dymott.com
Direct Dial (619) 238-2243 San Diego, REPLY TO
41-865 BOARDWALK, SUITE 113
PALM DESERT, CALIFORNIA 92211
TELEPHONE (760) 568-9959, FAX (760) 340-0011

January 18, 2001

Michael A. Kaplan, Attorney at Law, 3232 Governor Drive, Suite A, San Diego, California 92122-2489

SENT VIA FACSIMILE AND U.S. MAIL (858) 453-6122

Re: Nancy Mitchell v. Gregory Shain, D.D.S., et al
Our File No.: 07344

Dear Mr. Kaplan:

Thank you for your fax of January 16, 2001. We to object to any witnesses not earlier identified in discovery or supplemental discovery. Also, we will object to and file motions in limine with respect to any additional bases or opinions concerning Dr. Sperber. Whether or not you will waive any statutory notice provisions at this point is not relevant. It is impossible to take Dr. Sperber's deposition again. Stipulations regarding the admissibility of billing and records will be handled on a case by case basis. We will not stipulate to the letter regarding the suspension of Sacrenty.

Should you have any questions, please contact the undersigned. Very truly yours,

NEIL, DYMOTT, PERKINS, BROWN & FRANK

"s/David G. Brown", David G. Brown

DGB/mmb cc: Gregory shain, B.D.S.

NEIL, DYMOTT, PERKINS, BROWN & FRANK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1010 SECOND AVENUE, SUITE 2500
SAN DIEGO, CALIFORNIA 92101-4906
TELEPHONE (619) 238-1712, FAX (619) 238-1562
E-mail address dbrown@neil-dymott.com
Direct Dial (619) 238-2243
41-865 BOARDWALK, SUITE 113
PALM DESERT, CALIFORNIA 92211
TELEPHONE (760) 568-9959, FAX (760) 340-0011
San Diego, REPLY TO

January 24, 2001

Michael A. Kaplan
Attorney at Law
3232 Governor Drive, Suite A
San Diego, California 92122-2489

Re: Nancy Mitchell v. Gregory Shain, D.D.S., et al
Our File No.: 07344

Dear Mr. Kaplan:

We had an opportunity to review your letter of December 18, 2000 regarding Ms. Mitchell's proposed deposition changes. We would point out that her changes were not made in the stipulated time after her receipt of the deposition. We will request our trial judge enforce this provision.

Should you have any questions, please contact the undersigned.

Very truly yours,
NEIL, DYMOTT, PERKINS, BROWN & FRANK
"s/David G. Brown"
David G. Brown

DGB/mmb cc: Gregory Shain, B.D.S.
(F:\dbrown\MMB1696.DOC;1/24/01 05:26 PM)

NEIL, DYMOTT, PERKINS, BROWN & FRANK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1010 SECOND AVENUE, SUITE 2500
SAN DIEGO, CALIFORNIA 92101-4906
TELEPHONE (619) 238-1712, FAX (619) 238-1562
E-mail address dbrown@neil-dymott.com
Direct Dial (619) 238-2243
41-865 BOARDWALK, SUITE 113
PALM DESERT, CALIFORNIA 92211
TELEPHONE (760) 568-9959, FAX (760) 340-0011
San Diego, REPLY TO

January 24, 2001

Michael A. Kaplan
Attorney at Law
3232 Governor Drive, Suite A
San Diego, California 92122-2489

Re: Nancy Mitchell v. Gregory Shain, D.D.S., et al
Our File No.: 07344

Dear Mr. Kaplan:

We received your letter dated December 18, 2000 regarding Dr. Sperber's proposed changes to his testimony.

First, Dr. Sperber did not advise us of his changes within the stipulated time. More importantly, it is clear from not only this letter but subsequent correspondence that Sperber has reviewed additional material. The only deposition transcripts prepared after Sperber's depositions have been of percipient witnesses. Obviously, his opinions and bases for these opinions have not changed based on this limited information. It is our intention to insist that the court limit Dr. Sperber to the opinions testified to at the time of his deposition. As you recall, you executed a declaration stating Sperber would be prepared for his testimony. Dr. Sperber indicated repeatedly he was in fact

prepared for his deposition and had reviewed all the material you felt was appropriate.

On the basis of *Kennemur v. State of California* (1982) 133 Cal.Ap.3d 907, 919 and *Bonds v. Roy* (1999) 20 Cal.4th 140, 148, we will request the court limit Sperber to the opinions testified to at his deposition. Failing this, we will request that the court allow us to retake the deposition of Dr. Sperber before his trial testimony. This deposition will be at your expense and would include attorney's fees as wll as the cost of deposition and the presence of Dr. Sperber.

It is neither legal nor fair to expect this office subsequent to the 30 day stipulation and after you properly designated Dr. Sperber to be subjected to the surprise this tactic engenders.

Very truly yours,

NEIL, DYMOTT, PERKINS, BROWN & FRANK

"s/David G. Brown"

David G. Brown

DGB/eek

cc: Gregory shain, B.D.S.

(Clerk's Record pg. No.) 000536

FILED, Clerk of the Superior Court
JAN 23 2001
BY: V. BRIDGES

MICHAEL A. KAPLAN, ATTORNEY AT LAW
STATE BAR NUMBER 48087
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CALIFORNIA 92122-2489
(858) 453-6122, ext. 11 Phone, (858) 453-2155 Fax
ATTORNEY FOR PLAINTIFF, NANCY MITCHELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
SAN DIEGO COUNTY, NORTH COUNTY BRANCH
NANCY MITCHELL, Plaintiff, v.
GREGORY SHAIN, D.D.S., et al, Defendants

CASE NO. GIN 001485
PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE #1 OF 6 TO LIMIT TESTIMONY OF PLAINTIFF'S EXPERT TO THE TESTIMONY PROVIDED AT DEPOSITION

Trial Date: January 26, 2001; Dept: 27;
Judge: HON. THOMAS P. NUGENT
Complaint Filed: February 8, 2000

I. FACTS

Plaintiff's expert Dr. Norman Sperber was deposed by Defendant on November 16, 2000. Following said deposition, Defendant served numerous additional deposition notices for other witnesses.

Dr. Sperber indicated in his deposition testimony that he would be reveiwing transcripts of depositions and discovery yet to be taken, and that such review could

influence his opinions.

At the conclusion of Dr. Sperber's deposition, the parties stipulated that Defendant would be notified of transcript changes. In fact, upon his review of the deposition transcript, Dr. Sperber set forth a number of transcript changes as a result of his review of additional material which had been elicited.

On December 18, 2000, Plaintiff's counsel did in fact notify Defendant by letter of Dr. Sperber's deposition transcription change (see letter of Mr. Kaplan date December 18, 2000, a true and correct

///

(Clerk's Record pg. No.) 000537

copy of which is enclosed as Exhibit A). Said letter set forth additional opinions which had not been elicited previously by Defendant.

In Exhibit A, Defendant was offered the opportunity to undertake a follow-up questioning of Dr. Sperber with regard tot he noted changes. In so doing, Plaintiff offered to waive discovery cut-off dates.

II.

DEFENDANT HAD SUBSTANTIAL ADVANCE NOTICE OF DR. SPERBER'S OPINION AND HAD ADEQUATE TIME TO PREPARE FOR HIS CROSS EXAMINATION AND REBUTTAL.

Exhibit A was provided to defendant some six weeks prior to the January 26, 2001 trial call date. At no time did Defendant make any request whatsoever to re-question Dr. Sperber.

The cases cited by Defendant in its Motion in Limine Number One support the proposition that

unexpected expert testimony should be limited at trial. Given the fact that Defendant had substantial advance notice of Dr. Sperber's opinions, the criteria for restricting his testimony has not been met.

CONCLUSION

Defendant has not established its entitlement to limit the scope of Dr. Sperber's testimony, since it had both notice and opportunity to question him further.

Respectfully submitted,

Dated: January 21, 2001

"s/Michael A. Kaplan"
Attorney for Plaintiff
NANCY MITCHELL

(Clerk's Record pg. No.) 000538 (*NOTE: Bold lettering added for emphasis in the following:)

(Handwritten) "File"

MICHAEL A. KAPLAN, ATTORNEY AT LAW
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CALIFORNIA 92122-2489
e-mail:mjkaplan@cts.com

December 18, 2000

David G. Brown, Esq.
Neil, Dymott, Perkins, Brown & Frank
1010 Second Ave, Suite 2500
San Diego, CA 92101

Re: Mitchell v. Shain, et al

Dear Mr. Brown:

On December 13, 2000, Dr. Sperber signed his deposition transcript with the following changes as noted

on the enclosed Errata Page:

PAGE	LINE	CHANGE
9	15	1950
95	14	"Non-anatomical" rather than "anatomical"
103	17	8/31 rather than 8/21
19	10	I have testified on cases involving TMD
60	6	Adjustments and other types of dentistry, including root canal therapy and replacing #30 (crown)
83	3	That is not correct
88	15	Placed and improperly adjusted in the patient's mouth as opposed to removing the crowns during the equilibration process.
91	14	Change 3 and 4 to 4 and 5
93	12	Change 3 and 4 to 4 and 5

(Clerk's Record pg. No.) 000539

PAGE	LINE	**CHANGE**
95	**21**	**and #30 were rendered non-anatomic as a result of overgrinding.**
96	24	Add after "model"–"and I believe any kind of crown could have been used."
97	18	Change #20 to 21
98	4, 6	Change #20 to 21
99	11	Proper clinical procedure entails performing all adjustments prior to final cementing or bondage.
105	25	Change "No sir" to "Yes sir."

		Eliminate line and insert "patient taking Ibuprofin (9-8-98) and was prescribed Hydrocodone by Dr. Shain."
106	9	Add "on crowns that have been cemented onto already sensitive teeth, the equilibration procedure is made needlessly more difficult.:
110	20	Change "doesn't" to "does"
111	1	Add "not" before "correct"
111	5	Delete line. Records reveal (9-8-98), (915-98), that adjustments were indicated.
112	2	Add "but based on the records as well."

(Clerk's Record pg. No.) 000540

121	14-16	Delete response. In Ms. Mitchell's case, since the teeth were chronically sensitive, the use of a local anesthetic would distort the patient's ability to discern any abnormalities in her occlusion (see pp. 86-87 of Dr. Shain's depos of 10/27/00 in which he states on line 22 "two carpules of lidocaine 2% block and infiltrate..."). Therefore, I feel that permanently cementing these teeth under the above circumstances was below the standard of care.
122	12	Add "because this action resulted in the loss of the anatomical occlusal features of the teeth which facilitate

		chewing; and, the loss of the original gloss and luster of the crowns, which lends to the sticking of certain foods or chewing gum and the loss of a smooth surface experienced by the patient."
123	17	Add "you repolish or reglaze before you have permission to permanently cement."
125	11	Add "and subject to further reading."
128	8	Add "omitting from this patient's clinical record the dates of all adjustments and all complaints of discomfort and pain as related to me by Ms. Mitchell, is also below the standard of care."

(Clerk's Record pg. No.) 000541

129	11	Add "However, I believe it is certainly below the standard of care to advise a patient to leave a retraction cord in place for approximately 1 ½ weeks and not allow her to come for further occlusal adjustments.
134	6	Add "despite the fracture line described by Shain" (Depo. P. 76, lines 2-4).
135	24	Add "I anticipate that Ms. Mitchell will require on-going treatment. This was all avoidable."

In light of Dr. Sperber's deposition changes, and

upon Defendant's request, **Plaintiff will stipulate to Dr. Sperber's follow-up deposition on these changes**. In doing so, Plaintiff will waive discovery cut-off dates and statutory timeliness requests.

Thank you for your ongoing assistance in this case. Happy Holidays.

Sincerely,
S/MICHAEL A. KAPLAN

enc.

FILED
Clerk of the Superior Court
JAN 23 2001
BY: V. BRIDGES

MICHAEL A. KAPLAN, ATTORNEY AT LAW
STATE BAR NUMBER 48087
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CALIFORNIA 92122-2489
(858) 453-6122, ext. 11 Phone, (858) 453-2155 Fax
ATTORNEY FOR PLAINTIFF, NANCY MITCHELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
SAN DIEGO COUNTY, NORTH COUNTY BRANCH
NANCY MITCHELL, Plaintiff, v.
GREGORY SHAIN, D.D.S., et al, Defendants

CASE NO. GIN 001485
PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE #2 OF 6 TO PRECLUDE TESTIMONY REGARDING VIOLATIONS OF 16 C.C.R. 1086

Trial Date: January 26, 2001; Dept: 27;
Judge: HON. THOMAS P. NUGENT
Complaint Filed: February 8, 2000

I. FACTS

The law in California (Title 16, Professional and Vocational Regulations, Section 1086) prohibits a non-registered dental assistant from delivering temporary crowns. Plaintiff NANCY MITCHELL has testified at her

deposition that Defendant's assistant, Denise Sacrenty, did in fact drill in her mouth. Plaintiff complained that said drilling and of that Defendant was excessive, created occlusal problems, and eventually led to temporomandibular joint dysfunction.

It was only after litigation began that Plaintiff learned that, at the time of her treatment, the assistant was not licensed to do such drilling, nor was she licensed as a dental assistant (A true and correct copy of the State Department of Consumer Affairs letter of May 11, 1999 to this effect is attached as Exhibit A, and is incorporated herein by this reference). Had Plaintiff known that the assistant was unlicensed, she never would have permitted such drilling.

(Clerk's Record pg. No.) 000544

II.

THE PATIENT'S CONSENT TO A MEDICAL PROCEDURE MUST BE AN INFORMED CONSENT

In Cobbs v. Grant, the court set forth four "postulates" as the foundation upon which a physician's duty of disclosure rests. (Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505). Key among these is the third postulate, which states that to be effective, the patient's consent to treatment must be an informed consent. (Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505).

III.

TO GIVE INFORMED CONSENT TO A MEDICAL PROCEDURE THE PATIENT MUST BE PROVIDED ALL MATERIAL INFORMATION

The formulation contained in BAJI No. 6.11 is relevant here. That is, the doctor is under a legal duty to

disclose to the patient all material information. "Material" information is that which is significant to a reasonable person in the patient's position, when deciding whether to accept or reject a recommended medical procedure. (Arato v. Avedon (1993) 5 Cal. 4th 1172, 858 P.2d 598, 23 Cal. Rptr. 2d 131, followed by Warren v. Schechter (1997) 57 Cal. App. 4th 1189, 67 Cal.Rptr. 2d 573).

IV.

THE MATERIALITY OF INFORMATION TO BE DISCLOSED IS A QUESTION OF FACT FOR THE JURY.

In Arato (supra), the issue was whether the physician was required to disclose life expectancy information to the patient. The court left it to the jury to decide whether that non-disclosure was material.

"We decline to intrude further, either on the subtleties of the physician-patient relationship or in the resolution of claims that the physician's duty of disclosure was breached, by requiring the disclosure of information that may or may not be indicated in a given treatment context,. Instead, we leave the ultimate judgement as to the factual adequacy of challenged

disclosure to the venerable American jury, operating under legal instructions such as those given here and subject tot he persuasive force of trial advocacy." (Arato, supra at 1186, 1187).

CONCLUSION

Had Plaintiff known that the dental assistant drilling in her mouth was unlicensed, she would not have consented to such procedure. Whether or not Defendant was required

to disclose this fact to Plaintiff is a question of fact to which a jury must respond. It should not be the subject of a motion in limine.

Respectfully submitted,

Dated: January 21, 2001

"s/Michael A. Kaplan
MICHAEL A. KAPLAN
Attorney for Plaintiff
NANCY MITCHELL

///
///
///

(Clerk's Record pg. No.) 000546(*NOTE: Bold lettering added for emphasis in the following:)
...OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY
State of California Department of Consumer Affairs
CA Consumer Affairs
COMMITTEE ON ..(blocked out), BOARD OF..(blocked out), 1428 Howe Avenue, S..(blocked out)
Telephone (916)..(blocked out)
DAVIS, Gove...(blocked out) stamp... (blocked out)

COPY

May 11, 1999

To whom it may concern:

This is to certify that the records of the Board of Dental Examiners, committee on Dental Auxiliaries of the State of California indicate that:

DENISE MARIE SACRENTY

was issued license number RDA 23839 on March 21, 1984 to practice as a Registered Dental Assistant in the State of California on the basis of successful completion of the required examination; a minimum score of 75% is required for passing; that said license was in good standing with this Board until it **expired on February 28, 1985.** Said license was terminated after five (5) years for non payment of renewal fees. Our records show that no disciplinary action has been brought against Ms. Sacrenty.

Witness my hand and seal of the Board of Dental Examiners of the State of California this 11th day of May, 1999.

Sincerely,

"s/Karen R. Wyant", Karen R. Wyant, Executive Officer
Committee on Dental Auxiliaries, SEAL;
(& Deposition stamp) **EXHIBIT 11, Shain 10/27/00**

(*NOTE: Bold lettering added for emphasis in the following:)

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY GRAY DAVIS, Governor
DENTAL BOARD OF CALIFORNIA, 1432 HOWE AVENUE, SUITE 85, SACRAMENTO, CA 95825-3241
TELEPHONE: (916) 263-2300, FAX (916) 263-2140
www.dbc.ca.gov
State of California Department of Consumer Affairs
CA Consumer Affairs, Seal (unreadable)

May 10, 2002

Nancy Mitchell
8840 Villa La Jolla Drive, #214
La Jolla, CA 92037

Re: RDA Denise Marie Sacrenty

Dear Ms. Mitchell:

This is in response to your phone and fax request for citation information on the above licensee. As was provided in the letter of certification from Karen Wyant, Executive Officer, Committee on Dental Auxiliaries, RDA 23839 was issued to Ms. Sacrenty March 21, 1984, **this license expired on February 28, 1985. An expired license is invalid in California.**

Ms. Sacrenty was issued RDA 56535 on October 2, 2000 on the basis of successfully completing the required examination. A search of the Board's records confirms that no disciplinary action has been taken against this license. Since the inception of the Board's citation program in 1993, no citations have been issued to Ms. Sacrenty.

Sincerely, "s/Anita Dowty"
Anita Dowty, Staff Services Analyst

(Clerk's Record pg. No.) 000948 (*NOTE: Bold lettering added for emphasis in the following:)
(Shain deposition)
Mitchell v. Shain Multi-Page
Gregory Shain, D.D.S. - **10/27/00**

Excerpts from Shain's deposition transcript taken 10/27/00.

Page 67, lines 2-25

2) Q. And on the next line with regard to No. 4 – let me
3) apologize. My copy did not come out.
4) A. No. 4, "PJC prep and build up." In parentheses,
5) "Poly-gel, temp." in parentheses, "pro temp."That would
6) be the temporary crown.
7) Q. **Who was it that fabricated the temporary crown?**
8) A. **Denise.**
9) Q. **And that would be Denise Sacrenty?**
10) A. **Correct.**
11) Q. Can you spell her last name?
12) A. S-a-c-r-e-n–t-y.
13) Q. When you say "temporary crown," would that also
14) be considered a mold, or is that something different?
15) A. That's something different.
16) Q. **Do you know of any licensing requirement for**
17) **Denise to create a temporary crown?**
18) A. **Yes.**
19) Q. **And what is it, to your knowledge, in that**
20) **regard?**
21) A. **That an RDA needs to be doing temporary crowns.**
22) Q. That's a registered dental assistant?
23) A. Correct.
24) Q. **Do you know if Denise possessed such a license on**
25) **8-13-98?**

Page 68, lines 1-25

1) A. **She had a license that she had been an RDA and had**

2) **gone through the qualification process, but I don't have**
3) **any evidence that she was currently licensed at**
4) **that time.**
5) Q. **If I were to show you a record that her license for**
6) **RDA expired some 13 years before and had not been**
7) **renewed, would that surprise you?**
8) **A. I know that now.**
9) Q. You did not know that at the time?
10) A. No.
11) Q. **How long had Denise Sacrenty been working for**
12) **you?**
13) A. **She was employed in my office in, I think, '96.**
14) Q. She first began in 1996?
15) A. Correct.
16) Q. **Did you inquire at that time whether or not she**
17) **had a license?**
18) A. **I did.**
19) Q. **And you were told what?**
20) A. **That she did.**
21) Q. **She had one that was valid at that time in**
22) **1996?**
23) A. **She showed me her license from when she**
24) **qualified, she graduated.**
25) Q. **Do you know if in 1996 that license was still**

Excerpts from Shain deposition **Page 69, lines 1-17**

1) **valid?**
2) A. **No.**
3) Q. You don't know, or it wasn't?
4) A. No.
5) Q. I'm not sure what the "no" refers to.
6) A. **I didn't know whether it was valid or not.**

7) Q. Are you saying she began work for you in 1996?
8) A. Yes, as far as I remember.
9) Q. **And over the ensuing two years until**
10) **Ms. Mitchell came in for treatment, did you ever further**
11) **evaluate whether or not her license was current?**
12) A. **That was generally done by my office managers,**
13) **and I had two different office managers during that**
14) **time.**
15) Q. **Do you know whether that inquiry was made by**
16) **either of the two office managers?**
17) A. **No.**

Page 66-69

(Clerk's Record page No.) 000911
(NOTE: Bold letters added for emphasis.)
NORMAN D. SPERBER, D.D.S. **11/2/00**
(Exerpts of Dr. Sperber's deposition **taken 11/2/03.)**
Page 50, lines 1-25
1) BY MR. BROWN:
2) Q. On the envelope it says, "Patient Nancy
3) Mitchell, she will pick up and pay for, thanks." And
4) it's an envelope with Dr. Coffey's name and address on
5) it.
6) There's also- - **it's not quite a photocopy,**
7) **but the means by which x-rays are currently**
8) **photocopied.** And it appears to be copies of
9) Dr. Shain's films of 1998. **And the exam date says**
10) **October 22, 1998. Oh, it's Dr. Olmstead, and there**
11) **appears to be some handwriting.**
12) **Did you ever review this document, which will**
13) **be Exhibit 22?**
14) **A. Yes, sir, I did.**
15) (Exhibit 22 marked)
16) BY MR. BROWN:
17) Q. And the handwriting's not done by you, I take
18) it?
19) A. Can I take a look at it, please?
20) Q. Sure.
21) A. (Indicating.)
22) No, sir.
23) Q. And this is something, again, that you
24) received last night?
25) A. Yes, sir, I did.

(*NOTE: Bold lettering added for emphasis in the following:)

Deposition of Edward B. Coffey taken November 13, 2000; Paulson Reporting Service

Excerpts from Coffey Deposition,
Page 21, lines 8-25 (examination by Mr. Kaplan)

8) BY MR. KAPLAN:
9) Q. If I may, let me clarify a couple of things.
10) Let's go off the record for a second.
11) (Discussion off the record.)
12) BY MR. KAPLAN:
13) Q. Doctor, have you had any discussions with any
14) other dentist regarding the treatment of Ms. Mitchell?
15) A. Yeah. **I did have a call from Dr. Shain once.**
16) **He called me on a Thursday afternoon. He was desper-**
17) **ate. He told me that this crazy patient was picketing**
18) **his office.**
19) And I said, "Who is that?"
20) **And he said it was Nancy Mitchell.**
21) And I said, "Oh, I remember her."
22) **And he said, "Could you come to talk to the**
23) **judge and tell the judge that she's crazy and I didn't**
24) **cause it?**
25) **And I said, "No, I will not do that because I**

Page 22, lines 1-25

1) **think you caused it."**
2) Q. **What is it that you think he caused?**
3) A. **I think he started the TMJ problems that she**

4) **had. I think Nancy -although she might be a high**
5) **strung individual, her bite seemed to be okay before**
6) **she saw Shain. And it just threw her over the edge**
out
7) **of her bite and so forth.**
8) Q. Have you spoken with any other dentists
9) regarding Nancy Mitchell besides Dr. Shain?
10) A. Dr. Phillips.
11) Q. Could you give us the essence of that
12) conversation.
13) A. He basically told me that she was high strung,
14) but that she didn't have any TMJ problems at the time.
15) And he wrote a letter to verify that.
16) Q. Did you agree with his assessment that she had
17) no TMJ problems?
18) A. What threw me off in her case was that she had
19) almost a normal opening. I can't recall if I recorded it
20) in the chart or not. But I do remember she had almost a
21) normal opening when- - she could open her mouth. **She**
22) **couldn't hold lateral excursions. Although I don't**
know
23) **if I made a note of that.** And the fact that she got
24) better when she was wearing a bite splint, that was like,
25) okay, this is muscular and she's doing better.

Paulson Reporting Service...

Excerpts of Coffey deposition, **Page 17, lines 23-25**
23) Q. Did you note - - **you testified earlier you**
24) **didn't note any evidence of bruxism.**
25) Did you note evidence of clenching?

Page 18, lines 1-25
1) A. I was sure she was clenching.

2) Q. And why is that, sir?
3) A. Because of the symptoms she had in her muscles.
4) Q. And what signs or symptoms did you note with
5) regards to the clenching?
6) A. **She had severe muscles spasms in the temporal**
7) **muscles and pain in the lateral excursions and so forth.**
8) Q. **And that's associated generally with stress?**
9) A. **Yes and no. People that have TMJ problems usually**
10) **develop TMJ problems because of a bite being out**
11) **of sync with the rest of the teeth.**
12) There's a lot of studies, and **I participated in**
13) **a study in 1981 where we - - in 50 students from the**
14) **University of Michigan we placed a high filling. This**
15) **was all volunteers. And after two weeks of having them**
16) **with a high filling, 20-something- - 28 maybe- -**
17) **developed TMJ symptoms.**
18) **After we took the high fillings out of the 28, 2 or**
19) **3 developed TMJ symptoms, and they stayed with them**
20) **over six months.**
21) So when you're overstressed, you have the
22) capacity to deal with the stress usually and you're
23) fine. **But all of a sudden you change the bite and create**
24) **an additional interference in the occlusional patterns that**
25) **you're used to and you usually have muscles spasms.**

Excerpts Coffey Deposition, **Page 19, lines 1-18**

1) Q That was the purpose of the bite splint?

A. Yes. It puts you in a silent period. It doesn't give you the opportunity to clench. And it gives you a flat plane so you don't have any interlocking between the upper and lower teeth.

And **usually after four to six weeks of bite splint therapy, patients get better, the muscles get relaxed and you're clear to go ahead and restore the teeth.**

Q. Did she wear the bite splint according to your directions during the course of time that you treated with her?

A. I think there was one time she forgot to bring it and one time she told me she couldn't bring it. But **she was pretty faithful, I think.**

Q. According to your chart, at least when she would wear the bite splint, the symptoms would improve?

A. That's correct.

(*NOTE: Bold lettering added for emphasis:)
Defense EXHIBIT 7, **DATE 11-2-00**
WITNESS Dr. Sperber,
1 page, Renee C. Roberts, CSA No. 6910

NORMAN D. SPERBER, D.D.S.
3737 Moraga Avenue, Suite A-302
San Diego, California 92117-5457
Area code 619- 273-1133

DECLARATION

I, Norman D. Sperber D.D.S., examined Nancy Mitchell on 7/17/00 at 3737 Moraga Avenue, San Diego, California. I have briefly examined her records, dental models, and radiographs. As a result of the clinical examination as well as the items mentioned above, I have the following opinions.

1. The treatment by Dr. Greg Shain was negligent and below the standard of care. (regarding his treatment of Ms. Mitchell. "s/NDS", is crossed out with a single line and initialed.)

2. According to Ms. Mitchell, a dental auxiliary, Denise Sacrenty, attempted to adjust her temporary and permanent crowns. In doing so, according to Ms. Mitchell, she employed a dental hand piece in the oral cavity. Such treatment by a dental auxiliary is inappropriate and below the standard of care.

3. As a result of treatment to Ms. Mitchell's right and left teeth she contracted a temporomandibular joint dysfunction/syndrome.

4. **Due to the short time allotted to me at this point, a more complete report will be prepared in the future.**

I declare under the penalty of perjury, that the foregoing is true and correct. Executed in the State of California, county of San Diego on July 18, 2000.

"s/Norman D. Sperber", Norman D. Sperber

(*NOTE: Bold lettering added for emphasis in the following:)

Norman D. Sperber, D.D.S.
De Anza View Medical Dental Center
3737 Moraga Ave., Suite A-302
San Diego, Ca. 92117
1-858-273-1133

The Supreme Court of California **May 21, 2003**
Second Floor, 300 South Spring Street
Los Angeles, Ca. 90013

Letter in support of review by the Supreme Court.
Re: Mitchell v. Shain, D.D.S., per Rules of Court 28(e)(5); Ameka Rules
Appeal Case No. DO38024

To the Honorable Supreme Court Justices:

I, Norman D. Sperber, D.D.S., was the forensic dental expert for Ms. Nancy Mitchell in Superior court case No. GIN001485 against Gregory Shain, D.D.S. **I am a past president of the San Diego County Dental Society. I was active on the California Dental Association/ Judicial Counsel** and held other appointments.

I believe Ms. Mitchell did not receive a fair trial. I am writing you to request a review of her appeal. I believe a review is warranted, which might result in the granting of a new trial.

According to the California Dental Board, **the dental assistant who participated in Ms. Mitchell's treatment had not been licensed as a RDA since 1985 and therefore should not have performed any treatment on Ms. Mitchell.**

I expected to return for redirect and rebuttal

testimony to explain my testimony but this did not happen. Had I been permitted to return the final day of the trial when I was available, even briefly for redirect and rebuttal, **any misunderstandings or omissions in my testimony** I may have made **relevant to** Ms. Mitchell's **TMD, Dr. Shain's duty** to Ms. Mitchell, or **acts not permitted to be performed by unlicensed assistants** would have been redressed and clarified. I also would have addressed the evidence presented by the defendant regarding **photographs which were not of Ms. Mitchell's** teeth, and were **falsely relied upon** by defense experts and jurors. **These photographs were used to prove Ms. Mitchell grinds her teeth when she did not**.

I believe **Ms. Mitchell's injuries are the direct result of the treatment rendered by both the unlicensed assistant and the dentist**. Both the temporary and the permanent crowns were over contoured and improperly equilibrated leaving an improper vertical dimension which caused Ms. Mitchell's TMD dysfunction. Ms. Mitchell had no problems

1

prior to her treatment but immediately following her treatment with Dr. Shain and his assistant, had problems, making the treatment rendered in that office the direct cause.

After the trial was over on May 2, 2001, the **Dental Board of California determined Dr. Shain's treatment was a "departure from the normal standard of care"** in the community by leaving the crowns high, needing to replace the crowns as they were inadequate, leaving an open margin under a crown, **and by allowing his assistant to work with an expired license.**

At the trial, I had shown the jurors x-rays of Ms.

Mitchell taken by **Dr. Olmstead dated October 22, 1998. These x-rays are incorrectly recorded as my having shown Dr. Coffey's x-rays instead**. I also testified about a study in which high fillings were placed in the participant's mouths resulting in TMD. After the high fillings were removed the TMD symptoms disappeared in most of the study participants, however, with a few of them, the TMD symptoms continued. **My testimony of this is not recorded at all.**

I believe in the justice system. However, in this case, **I strongly believe the system failed Ms. Mitchell**. I understand she has filed a Petition for a Review with the Supreme Court. I consider her case as one worthy of review. I hope a new trial will be granted in this case.

I declare under the penalty of perjury in the state of California, the above is true and correct. Executed in the state of California, county of San Diego.

Sincerely,
"s/Norman D. Sperber"
Norman D. Sperber, D.D.S.
Dated: 5/22/03

(Page 1 of 4 sided flier handed out when picketing Shain's office in 5/00.)

In my opinion:

Get your dental records at each visit! If you don't, you may not get another chance!

Some attorneys say it's a fact:
Approximately 80 t0 90% of the time the dentist wins if a mal-practice suit is brought against him by a person injured by him. Why? It becomes a battle of the records. What you say happened carries little weight in comparison to the records. After the injury occurs, it can be difficult and sometimes impossible to get your complete records, especially if it might strengthen your case.

Dentists self regulate and write their own laws to abide by. This includes being able to summarize your chart notes, even if this act may alter the outcome of your case and cause you to lose. The Dental Board told me it is not mandatory for dentists to keep your records for seven years, it is merely suggested. They are also given the time to summarize your notes, usually ten to fifteen days to respond after a written request is received. If the records are gone though, what can they do? Their self governing rules give them both the time and te ability to summarize, to protect themselves first. Few dentists will go against one of their peers in the area and most will do what ever it takes to protect each other. By doing so, they keep their insurance

costs down to a minimum. Due to records being less than adequate, contradictory, deleted, and altered, no attorney wanted to represent me. One attorney told me I had been a victim of organized crime before he turned me away. Many other attorneys agreed with this statement before they, too, turned me away. I had to file a suit in pro per. I never stood a chance to win against these very practiced and well orchestrated professionals. I'm out about $8,500.00 and I have thousands to tens of thousands of dollars to go to correct the damage done to me, if it can be corrected.

Get a copy of your records at each visit to the dentist, including all hand written chart notes. This way erroneous information cannot be added later or deleted to protect them and keep their insurance rates down. With your records in hand, mistakes, misjudgements, and wrong diagnosis' will not be able to haunt you in the years to come. If you think only credit reports contain errors, think again! Maybe it will never happen to you, but what if it does? If it happened to me, it could happen to you or someone you love. If the general public banded together and enacted this policy of getting their records regularly, these dental practitioners would no longer have an 80 to 90% winning ratio against consumers who have been injured by them! The problem would no longer exist as they would no longer have this power!

Take a stand and tell your family, friends, and neighbors to get their dental records, and medical records, too. They may thank you for it later!

(Expert declaration in subsequent malpractice case #GIN019954 against my ex-attorney Michael A. Kaplan.)

DECLARATION OF STEVEN J. FREEBURG

I, Steven J. Freeburg, declare as follows:

1. I am an attorney licensed to practice in California for over 30 years and have tried in excess of 150 civil jury trials. Over 30 of these have been dental malpractice cases and I am familiar with the standard of care for a trial lawyer in such civil litigation.
2. On August 18, 2003 I met with Nancy Mitchell and reviewed the transcripts and pleadings in the dental malpractice trial wherein she was represented by Michael Kaplan, Esq.
3. It is my opinion that the standard of care was violated if the following acts occurred which have been described to me by Ms. Mitchell.
4. The failure to elicit from Dr. Sperber at his deposition those criticisms of the dental malpractice defendant which Attorney Kaplan knew ("of" is stricken with a line through it) Dr. Sperber held (hand written "Dr. Sperber held" inserted in place of "of") would be below the standard of care presuming the questioning called for all the opinions of Dr. Sperber. Trial counsel should be prepared to elicit these criticisms on his own examination of the expert if the expert has not recalled them.
5. The failure to send corrections of the deposition of Dr. Sperber, plaintiff or any other witness to opposing counsel in a timely fashion presuming Dr. Sperber or such other witness was timely in

providing them to trial counsel would be below the standard of care. Trial counsel needs to abide by the deposition stipulation or obtain extensions or bring appropriate motions if needed to permit such corrections.

6. If Dr. Sperber had been contacted and plans made to put him back on the stand were made and trial counsel failed to inform the court of this fact when the court inquired about time issues such failure to inform the court of such time issues would be below the standard of care. Any action by trial counsel in misinforming his client and claiming such conduct was appropriate on his part and was the "fault" of the trial court - - if counsel did not inform the court - - would be improper

and unethical and below the standard of care. The scheduling of witnesses at trial is always difficult and the court needs to be kept appraised of any witness problems or scheduling difficulties.

7. If trial counsel failed to contact Dr. Kohani, who treated plaintiff within a few weeks of defendant dentist, and determine the state of the occlusion at that time and to consider having the doctor testify would be below the standard of care.

8. If Mr. Kaplan with held from Ms. Mitchell any protion of the file and failed to deliver the entire file to her within a reasonable period of time upon her request such with holding would be unethical and below the standard of care. The file of a client must

be delivered (either the original or a copy) within a reasonable period of time upon the client making such a request.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge or opinion. Executed thie 21 day of August 2003 at Pasadena, California.

"s/Steven J. Freeburg"
Steven J. Freeburg, Declarant

(*NOTE: Bold lettering added for emphasis in the following:)

MICHAEL A. KAPLAN
ATTORNEY AT LAW
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CA 92122
PHONE: (858)453-6122, FAX (858)453-2155

FAX COVER SHEET

(*Fax disclaimer/privacy notice omitted in this copy.)

TO: David G. Brown, Esq.
FAX NO.: 619-238-1562
FROM: Michael A. Kaplan
DATE: 2/12/01
RE: Mitchell v. Shain

David: I am writing to confirm some of the items we discussed after the jury left on Thursday. Specifically, I understand that **your office will be providing the BAJI's** and the proposed verdict form, and provide copies to me. You have also indicated that your witnesses for Tuesday will be the remainder of Dr. Shain's testimony, plus Dr. Machado, Dr. Cassat, and the Cutri deposition. Please let me know what excerpts from the Cutri deposition will be read to the jury. Would you let me know by close of business on Monday of any changes to the foregoing. Thanks, **I appreciate the efforts of your staff in putting together the BAJIs.**

Michael

Number of pages sent including face sheet: -1-
Please call (858) 453-6122 immediately if all pages are not received. 0ur facsimile number is (858) 453-2155.

(*NOTE: Bold lettering added for emphasis in the following:)

MICHAEL A. KAPLAN
ATTORNEY AT LAW
3232 GOVERNOR DRIVE, SUITE A
SAN DIEGO, CA 92122
PHONE: (858)453-6122, FAX (858)453-2155

FAX COVER SHEET

(*Fax disclaimer/privacy notice omitted in this copy.)

TO: David G. Brown, Esq.
FAX NO.: 619-238-1562
FROM: Michael A. Kaplan
DATE: 2/17/01
RE: Mitchell v. Shain

David: **At his deposition and trial, Dr. Sperber testified to his opinions regarding only the procedural violations of the standard of care. He has other opinions related to the disclosure issues as well, vis a vis the drug issue, the assistant unlicensed since 1985, etc. if you want to further depose him on these issues, before the new trial,** he will waive his fee and plaintiff will pay the reporter. Please let me know of any interest you may have.
Regards,

Number of pages sent including face sheet: -1-
Please call (858) 453-6122 immediately if all pages are not received. 0ur facsimile number is (858) 453-2155.

(*NOTE: Bold lettering added for emphasis in the following:)
(Clerk's Record page No.) 000695
Nancy Mitchell
8840 Villa La Jolla Drive, #214
La Jolla, Ca. 92037
858-271-2414
Superior Court for the State of California
for the County of San Diego, North County Branch

Nancy Mitchell, Plaintiff, v.
Gregory Shain DDS, BDS, BDS Inc; Poinsettia Village Dentistry; Denise Sacrenty; Joy Dental Lab; et al. And Does 1-50, inclusive. Defendants.

Case #GIN001485
DECLARATION OF MICHAEL A. KAPLAN IN SUPPORT OF PLAINTIFF'S MOTION FOR A NEW TRIAL (CCP 659)

HON. JUDGE LISA GUY SCHALL
Department 28

DECLARATION OF MICHAEL A. KAPLAN, ESQ.

I, Michael A. Kaplan, do hereby declare I was the attorney of record representing Nancy Mitchell in case #GIN001485, Mitchell v. Shain et al, during the trial in February of 2001 and have the following opinions related to specific rulings.

1. Dr. Sperber had begun his testimony as an expert for the plaintiff in the beginning of the trial on February 6, 2001. However, **I was unable to present Dr. Sperber for redirect or rebuttal testimony examination.** This was **due to the Court surprisingly curtailing any**

further testimony as of February 14, 2001. I explained to the Court that February 14th was a day Dr. Sperber could not attend court for his redirect or rebuttal testimony as he was out of the area on business. I also notified the Court he was

1

(Clerk's Record page No.) 000696

available for redirect and rebuttal testimony on the following morning of February 15th, the final day of the trial. Previously, the judge had been very flexible, and at the request of both counsels, had taken multiple witnesses out of order without question. **By the Court closing testimony late on February 14th with no possibility of our expert being able to return to testify until the next morning, this act seriously disadvantaged the plaintiff.** This is especially true considering that eight days had passed subsequent to Dr. Sperber's testimony, and in that time period the defense had four dentists, two dental experts, and the defendant dentist all testify on behalf of the defendant. I believe Dr. Sperber's redirect and rebuttal testimony was critical to justice being served.

2. I was also surprised that the court would not allow informed consent testimony from the plaintiff regarding the defendant's drug use, his upcoming surgery, his psychiatric history, and his use of an unlicensed assistant. **The judge ruled informed consent had to be within expert testimony** or expert evaluation. I felt this was an incorrect application of existing law. **Due to the Court's preclusion of the plaintiff's informed consent testimony on these vital and relevant issues to the case, and precluding Dr. Sperber's redirect and rebuttal**

testimony on February 15th, the jury did not have an opportunity to evaluate and make findings concerning relevant informed consent issues.

3. There were a number of court rulings which allowed defense witnesses' testimony discrediting the plaintiff. My objections to such testimony based upon materiality, relevance, and Evidence Code 352 were, more often than not, over ruled.. Hence, the jury heard the defense's testimony of the plaintiff's alleged "breaking into" a dentist's private office, that she was allegedly "harassing" and "verbally abusive", and **that she "lodged complaints against various dentists" with the state Board of Dental Examiners due to record issues.** This testimony was severely prejudicial to the Plaintiff and of questionable relevance in a mal practice case.

2

(Clerk's Record page No.) 000697

4. Lastly, I also felt the plaintiff was placed in a **detrimental position by the court's complete rejection of informed consent jury instruction.** In this regard it should be noted that the **plaintiff was permitted to testify limitedly to some informed consent issues.** One such issue she testified to is the consent form she signed "following" her treatment with defendant, after the administration of nitrous oxide.

VERIFICATION

I, Michael Kaplan, to hereby declare the foregoiung is true and correct under the penalty of perjury inthe state of California, coounty of San Diego.

DATED: 3/11/01 SIGNED: "s/Michael A. Kaplan"
Michael A. Kaplan, ESQ.

3

Nancy Mitchell
8840 Villa La Jolla Drive, #214
La Jolla, Ca. 92037
858-271-2414

Dr. Kambiz Kohani
8650 Genesee Ave, Ste. 312
San Diego, Ca. 92122
858-622-1007

DECLARATION OF DR. KAMBIZ KOHANI

1) I took x-rays of Nancy Mitchell in 9/98; Yes ✔ No ___
and I have the original x-ray films. Yes __ No ✔

2) I also backed up Nancy Mitchell's x-rays on disk; Yes __ No ✔

If you do not have the original films or back up disk, explain: (Dr. Kohani wrote the following:) "x-rays were checked out on 5-4-00 for legal case - 2nd set of films were signed out on 1-26-01 to Knox Photo..."

3) I released Nancy Mitchell's x-rays to the following people on the dates specified: (Left blank)

4) All x-rays were later returned to me by all parties listed above unless specified here below: (Dr. Kohani wrote the following:) " NO x-rays or models were ever returned to my office.

5) (Check one) I did ✔; or did not __ release Nancy Mitchell's original study models to "others" in addition to Bert Rogers. (If you did release them to any "others" list their names and the dates released, and if and when they were returned.) (Left blank)

6) I did ___; or did not ✔ release any records of Ms. Mitchell's to attorney Michael Kaplan, Dr. Shain, their representatives, or "others" (excluding "Nancy Mitchell, Bert Rogers, & Knox for David Brown"). If you did release any records to Kaplan, shain, or others, please

specify which records they were, released to whom and when, and if and when they were returned. (Left blank)
7) I, Dr. Kohani, declare under the penalty of perjury in the state of California, the above is true and correct. Executed in the state of California, county of San Diego on January 7th, 2003.
DATED: 1/7/03 SIGNED: "s/Kambiz Kohani"
(date initialed and circled)

(Declaration of Debbie Beymer re:Sacrenty's drilling.)
(*NOTE: Bold lettering added for emphasis:)
DECLARATION OF EVENTS:

WHEN I SAW DR. SHAIN FOR THE FIRST TIME IN 1998, I DO REMEMBER HIS ASSISTANTS NAME STARTED WITH A "D" (DIANE OR **DENISE)** WITH BROWN HAIR AND **WAS THE ONE WHO FITTED ME FOR MY TEMPORARY CROWN, I ALSO REMEMBER BEING LEFT ALONE WITH HER WHILE SHE DRILLED AT MY TOOTH TRYING TO GET THE FIT RIGHT** AND HAVING ME GRIND MY TOOTH ON THAT CARBON PAPER, I DON'T KNOW HOW MANY TIMES, PLUS **FEELING VERY UNCOMFORTABLE THAT DR. SHAIN WASN'T DOING IT CONSIDERING HE WAS THE DENTIST, BUT HAD TO CHOICE BUT TO STAY ASSUMING SHE KNEW WHAT SHE WAS DOING.**

IT WAS OBVIOUS THAT **SHE DID NOT KNOW WHAT SHE WAS DOING BECAUSE, A COUPLE OF DAYS LATER I FOUND MYSELF HAVING THE MOST EXCRUCIATING PAIN I HAVE EVER FELT.** I COULD NOT SLEEP, LAY DOWN EVEN BARELY WALK THE PAIN WAS SO SEVERE. I EVEN FOUND MYSELF AT 2:00AM DRIVING AROUND TRYING TO FIND A STORE THAT MIGHT BE OPEN SO THAT I COULD PURCHASE TOOTHACHE MEDICINE.

THE WHOLE EXPERIENCE WITH DR. SHAIN MADE ME FEEL VERY (ONCE AGAIN) UNCOMFORTABLE AND UNEASY, THEREFORE I NEVER WENT BACK.

DEBBIE BEYMER,
"s/Debbie Beymer", **"s/5/17/2000"**
UNDER THE PENALTY OF PERJURY, THIS IS THE EVENT AS I KNOW IT.

(*NOTE: Bold lettering added for emphasis:)
STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY, GRAY DAVIS, Governor
State of California, Department of Consumer Affairs, CA

DENTAL BOARD OF CALIFORNIA, 1432 HOWE AVENUE, SUITE 85, SACRAMENTO, CA 95825-3241
TELEPHONE: (916) 263-2300, FAX (916) 263-2140

May 02, 2001

Nancy Mitchell
8840 Villa La Jolla Drive, #214
La Jolla, CA 92037

RE: Subject: Gregory Shain DDS
Case: 01-1999-2825

Dear Ms. Mitchell:

The Dental Board of California has concluded its review of your complaint.

The Board's dental consultant has thoroughly reviewed and evaluated all available complaint information, including all of your pertinent dental records. It has been determined that the treatment rendered to you as described in your complaint does not constitute a violation which warrants taking disciplinary action against the dentist.

However, **the Board did find that the treatment rendered was a departure from the standard of practice in the community. The subsequent treating dentists found inadequate crowns on teeth #4, and #30. Teeth #4 and #30 were high and tooth #30 exhibited an open**

margin. Teeth #4, #5, and #30 need root canal treatments, crown build-ups and crowns.

RDA Denise Sacrenty was working with an expired license. It is the dentist's responsibility to ensure that the employees have proper and current licenses. The Board will recommend to Dr. Shain that a refund is appropriate for the crowns on teeth #4, #5, and #30. Since the Board has no jurisdiction in refunds, if Dr. Shain does not comply with the Board's request, any further pursuit of this matter would have to be through the court system.

Thank you for bringing this matter to our attention.

Sincerely,
"s/K sp for Joan Hawkins"
Joan Hawkins
Consumer Services Analyst
(916) 263-2300 ext. 2310

EXCERPTS FROM THE TRIAL TRANSCRIPTS

(*Bold added for emphasis.)

CTp17-18 lines 12-25 & 1-12: (Brown) Ms. Sacrenty was at one point a registered dental assistant. She did not pay her fees. Her license was suspended. Dr. Shain will testify he was not aware of that and I, - - I suppose the plaintiff's will make an inference that he was. And I think the other issue is a registered dental assistant, by training and by law, can adjust and deliver temporary crowns. (Judge) so we're looking at, one, whether non payment of dues constitutes this. (Brown) Correct. (Judge) and two, depending upon the jury's interpretation of what she did or did not do and the extent of that and the knowledge of Dr. Shain. (Brown) Exactly, your honor.

Pg 18: (Judge)...a jury issue, it's a jury instruction, and I don't see the point on having to rule on it now. (Kaplan) Your honor, I see it more in the area of informed consent. This is a material fact to which the plaintiff should have been notified. (Judge) Have your expert testify they believe, if that is his or her opinion, that it constitutes a breach of the informed consent issue. That's something you certainly can raise for the jury. (Kaplan) Again - - that's outside the scope of his deposition,once again. (Judge) Then you may have a problem...

CTp 42-45; pg 42 lines5-6, 12-28:

(Judge)I'm going to take a moment to think on whether I want to get into the **picketing** at all...My concern is that it would give rise to us almost necessarily having to get into her reasoning behind it. That's - - under 352, I'm really **loathe to open up discussions on her motivation** and ask, really, in truth, in part, the jury to make a decision as to the- - altruism of her motivations or not. And that

would almost be a disservice to her, were you to bring up the **picketing**, that she couldn't give her reasons why she wanted to do this, which may give rise to lots of hearsay, lots of secondary issues. And since that is already set for a trial readiness conference on the 13th of April with a trial on May 11th, having a mini-trial within this trial on that issue, I think, would be really a problem, particularly because its's probably going to only add more time to this case in this particular matter.

CTp 43-44, line28 &1-2: (Judge)...I've decided, no, I don't want to get into the **picketing**. I don't want to hear about the picketing. I don't want to hear she went there...

CTp48-58: **pg48** lines13-28; (Judge) Before we left - - we were not on the record yesterday - - Mr. Brown indicated he would stipulate that the **errata** attached to plaintiff's opposition to 1 of 6 limine motion - - he had no objection to that errata. Now - - (Brown) Yes. (Judge) - - attached to what I read last night, which was a description of the informed consent which you want to add to the below the standard of care testimony of Dr. Sperber, was another set of errata. Mr. Brown, what's your position on these? (Brown) I was hoping, your honor, that that errata matched the errata attached to Mr. Kaplan's opposition to my motion in limine 2 of 6. (Judge) No.
Pg49 lines 1-4: (Brown) It does not? (Judge) It adds. (Brown) It's an additional addition? (Judge) Addition...
Pg50 lines 1-27: (Brown) So, as I understand it, your honor, these are additional errata as to what I had been served with on or about December 18th. (Kaplan) Not correct, your honor. (Judge) Well, it's different. It's additional language to the original errata, yes. And I went and compared them, Mr. Kaplan. And I'm not going to do it now because I've

got a jury waiting, and I want to on the record on what is important because it's likely to be commented on in opening statement, unlike - - this which I'm holding up is not going to be commented on, doesn't need to be commented on. And I'll make a final ruling. Because I didn't know if he was going to object or not to this. And if you think it's all one and the same, I would wonder why you'd ever put it together for me. So there are some changes, Mr. Kaplan. And I went through it last night, and I noted some additional language which seeks to clarify already testimony within the transcript. But let's defer on that. Let's go do the informed consent. This is key. Okay. Now, I've read the entire depo twice. Nowhere in there does Dr. Sperber testify that Dr. Shain fell below the standard of care for a failure to inform your client to issues of his medical or psychiatric disability - -

Pg 51 lines 10-28: (Kaplan) Your honor, I - - I believe that this is not within the purview of an expert. I believe that when we get into informed consent issues, those are questions of fact for the jury. Doesn't get into the malpractice, per se, if - - in my opposition, I had indicated that the - - the co tor is under a duty to advise the patient of all material information, and then it becomes a question of fact, what's material. (Judge) Now, what you're telling me is you don't need Dr. Sperber to testify; that your client would simply get on the stand, say he didn't give; and you would argue as a reasonable person, Dr. Shain should have told them that? (Kaplan) That's exactly right, your honor. (Judge) But it has nothing to do with Dr. Sperber? (Kaplan) That's exactly right. (Judge) So why did I read this deposition last night?

Pg. 52 lines 5-28: (Brown) ...And I think more abbreviated and perhaps more at the point, let's look at Baji 6.11, which details what informed consent is and has been in this state

for over 30 years. There is, first of all, a objective component to informed consent that does not require expert testimony; and that is, if the procedure involves a known risk of death or serious bodily harm, then you have a requirement to so advise the patient. That is step 1. I think we can all agree that under these circumstances, this does not meet that particular objective criteria. (Judge) I tend to agree. I'll tell you my reasons why. Okay. Let's focus on what we are here for, dental malpractice. Okay? You are seeking to put a layperson's opinion before this jury that his failure to give her this kind of information - - one, I am undergoing hip surgery in the near future; two, I will therefore not be your continuous treating dentist - - constitutes malpractice in part - - part of the picture of the malpractice. And under case authority, one, my reading the 6.10, 6.11 talks about risks that give rise to physical injury or death to a patient. Those kinds of caveats...

Pg 53 lines 1-16, 24-28: must be placed before the patient so they can make a knowing an intelligent decision whether they choose to seek treatment. And by case authority, it is implicit that only testimony through experts give rise to those factors that are going to constitute malpractice. So what you're seeking to do is bring in a separate and distinct piece of evidence that doesn't fall within the malpractice picture but gives rise to the general feeling that it's just one more thing Dr. Shain did that offended your client, didn't give her due notice and didn't fully advise her of it, but none of which under case authority I could find constitutes the parameters necessary to be a violation of the informed consent laws that currently is in California. This wasn't the sort of thing where he failed to provide her the risk factors in this particular case....

This particular thing, I think, is going to be extremely difficult for the jurors to put in proper place. They could

dangerously seek to place it in the same role of those opinions of Dr. Sperber, and it doesn't constitute valid expert opinion on the...

Pg 54 lines 1-10, 24-28: malpractice. I'm giving you the final word, but that's my feelings in this matter, Mr. Kaplan. I'm not going to allow you to get into those **two** items in this case. I think you're more than in a position to put before the jurors many, many things that are criticized by Dr. Sperber int his particular case. **Don't raise your hand, Ms. Mitchell. You're not the attorney on this matter. Mr. Kaplan is. Talk to him if you want him to say something to me.**....(Kaplan) we also have, your honor, issues not only of Dr. Shain's physical and psychological history but the issue of - - Ms. Mitchell will testify that an unlicensed dental assistant did some work on her; and had she known that, she would not have undergone the....

Pg 55 lines 1-28: ...treatment. She will also testify that - - (Judge) Well - - (Kaplan) - - she wasn't informed of the risks of TMJ as an aftermath of the treatment that Dr. Shain provided. So those are two areas outside the scope of psychological and physical disclosures. (Judge) The one thing I have to tell you that I find hard to believe is - - this is all information that would have been known to Dr. Sperber prior to his depo, but he doesn't - - after a rather exhaustive deposition and numerous breaks to refresh his memory by Mr. Mitchell herself, he doesn't make any comment on that in the deposition as to, in his expert opinion, falling below the standard of care. How is that? (Kaplan) My - - my recollection of the deposition, your honor, was that he was - - he - - Dr. Sperber was addressing issues of treatment malpractice. And that seems to be what - - the opinions that he gave was on treatment-related malpractice. (Judge) So - - ((Kaplan) And - - and - - (Judge) - - obviously, that was never put to him? I mean,

the thing that - - "Dr. Sperber, would you believe it's falling below the standard of care if a doctor fails to advise a patient of the following...

Pg 56 lines 1-4, 25-28: ... things," that was never asked of him? (Kaplan) that was not addressed, your honor. (Judge) Okay...

Line 21-22: (Judge) ...I've done quite a few dental malpractice, and that's very standard for a doctor to reference the failure...

Line 26-28: Now, to that end, certainly, I - - I will give your client the latitude to talk about - - she wasn't informed about the TMJ. That's relevant. She can talk about that issue.

Pg 57 lines 17-20, & 28: (Judge) And we're still going to be addressing this final grouping of errata when we take a break this morning, which, in looking at - - I'll give you a heads - up Mr. Brown - - I'm probably going to allow.

Line 28: (Kaplan) Your honor, there's a - - with the

Pg 58 lines 1-28: unlicensed - - what we believe was the unlicensed dental assistant. (Judge) Let's not have red herring here. Was she unlicensed? (Brown) She had her license suspended for nonpayment of fees. She had been licensed. (Judge) Okay. That doesn't constitute negligence per se. If that's were you're going with this, it won't happen. Miss Mitchell, you better maintain better control in front of the jury than you're doing in front of me. Okay. Let me explain something to you. A failure to pay dues does not make you incompetent. Do you know how many attorneys, Mr. Kaplan, appear in front of me who forgot to pay their bar dues? And I get a notice from the state bar that they'vbe been suspended, and we take aboout two days fo them to go off and send off a check. There's no logic to the suggestion that in that 48-hour period, they somehow became incompetent. If it's for other reasons of

suspension. I'd like to know what that is. I think you can bring the factor up. But I'm letting you know; I'm not sure that's going to constitute negligence per se. And **I've read the statutes on it.** I'd love something that talks about that right on point. But a lapse in dues in and of itself doesn't really sound to me like negligence per...

Pg 59 lines 1-11, 14-28: se. Suspension for cause, failure to do continuing education that results in a suspension, complaints to quality medical assurance - - yeah, I think those are all good issues that - - if you've got something there, let me know. But I'm not of the mind under case authority to find that. You're certainly inclined - - allowed to bring up the fact that her license had been suspended. And he's allowed to countermand that with the fact that is was simply a failure to pay dues.

Line 14: Were you planning on trying to make an opening statement that this constitutes negligence per se? Because I already ruled - - I deferred on that. That's a jury issue - - correction - - a jury instruction issue. (Kaplan) No. I wasn't addressing - - I was thinking more in the lack of informed consent area. (Judge) She can bring up the fact that this is an unlicensed person. But I'm not sure it's going to constitute an informed consent issue. Remember, you're trying to get this in as an amendment, probably, to the Baji instruction 6.11. Because if you read that instruction in its present composition, it wouldn't touch on that. Okay. I'm presuming you're going to be asking me to look at a special instruction somewhere down the road..

Pg 60 lines 1-28: that expands on the informed consent. I have to tell you that on first blush I don't see that being the case. I have to tell you, though, I think it's relevant enough for her to bring up the fact that this person wasn't licensed, she wasn't told about the consequences of the TMJ, from the standpoint it's just one more thing that suggests a lack

of communication between herself and Dr. Shain and that it goes to issues of credibility. Because I assume - - perhaps Dr. Shain may have another version of what did or did not occur between the parties. Will it give rise to a modification on the informed consent Baji? As it stands now, I'm not inclined to do that because I've already ruled a piece of that is gone. I'd like for you to show me how those limited areas constitute an expansion on the current Baji informed consent to give rise to a - - a factor that either on - - under a negligence per se theory or other of a violation of below the standard of care. I think doctors testify to below the standard of care, not laypeople. That's one problem that - - I see this turning into a - - a dangerous area expanding it to a layperson being allowed to come in here and testify to that. So I have problems with that. But you can, in opening, have her reference her testimony in this respect of the TMJ, the unlicensed dental hygenist - - what else was there?

CTp142 lines 1-25: (Kaplan) Can you describe the work that Miss Sacrenty did on your teeth. (Mitchell) Um, well, she did make my temporary crowns, and he put them in. And then in the end, he left and went tom um - - I - - I thought to go treat another patient because they had spent, like 45 minutes grinding them down in my mouth. And in the very end, she said, "Would you like me to finish up?" and he said, "Yes." So he left the office, and I don't know where he went. I assumed it was to treat someone else. And she picked up the drill and the carbon paper, and she kept drilling down on my teeth. And did drill back on the back filling, on No. 31, as well too because I - - (Brown) Objection, your honor. Lacks foundation. (Court) Sustained as to location. (Kaplan) Following the work that Miss Sacrenty did on your teeth - - (Mitchell) Yes.

(Kaplan) - - did Dr. Shain ever return to check on your teeth? (Mitchell) No. Never.

CTp143 lines 15-18: (Kaplan) Now, when you say you signed the release form. Had you not signed a release form before the treatment began? (Mitchell) No sir. I did not. It was on the way out.

CTp189 lines 12-27: (Dr. Sperber) - - and so, to me, it was quite obvious that the, um, over contouring of these temporary crowns and later the permanent crowns led to a disability in Miss Mitchell's mouth because she no longer had her normal occlusion. She no longer had her teeth meeting on both sides. And, again, according to the doctor, there were no problems when she first came into his office. There's still no mention about any disorder of the jaw. And then almost immediately after she is discharged after her first appointment when these temporary crowns are put in on the right side, she experience a tremendous sensitivity to the teeth. That's two different things we're talking about, sensitivity to the teeth and soreness to the jaws.

CTp196 lines 6-28: (Dr. Sperber) So in grinding and preparing a tooth after it's put in, you have - - you'r putting in almost useless crowns because they no longer have biting surfaces, they no longer have proper anatomic forms to chew the food. And at that point, you can't add to 'em. You can't add to 'em. If ou don't put 'em in or you put 'em in temporarily, it's possible or - - depending on the type of crown, to have it adjusted at the lab. You can add or subtract. But, again, I don't think it should have beenput in at all. And doing it that method, the teeth then, as he ground, were rendered nonanatomic. They were almost flat. **There's one x ray I have here that shows that No. 30**

just is as flat as a road. (Kaplan) Doctor, is this the x ray that you're referring to? (Dr. Sperber) Yes, sir, it is. It says 10/22/98. (Kaplan) That's correct. (Dr. Sperber) Yes. (Kaplan) Can you show us what you're talking about with tooth #30 sir? (Dr. Sperber) I certainly can.

Pg197 lines 1-28: (Kaplan) Approach the witness, your honor? (Judge) You may. (Kaplan) And perhaps explain to the jury. (Dr. Sperber) Yes, I will. This, again, is a x ray. This is a photograph of an x ray. And what you're doing is - - you're looking at Miss Mitchell's mouth like this. (Brown) Your honor, I'm sorry to object, but this basxis and partially the criticism is not - - (Judge) Well, let's come to sidebar. Okay. Put the x ray down, Doctor. Angie. The following proceedings were held at sidebar) (Judge) Okay, we're here at sidebar. Your objection to his testifying from this x ray, Mr. Brown, is? (Brown) This was not one of the bases of the criticisms. And, in fact, the six criticisms that he detailed primarily on pages 120-123 of his deposition is - - as the Court is aware from having read it last night, there is no - - and I also asked him the bases for all his opinion. There's no indication of relying on any of Dr. Coffey's films. (Judge) All right. Response, Mr. Kaplan.

Pg 198 lines 1-24: (Kaplan) If it wasn't included as a basis, then I would withdraw that. (Judge) All right. Let's withdraw, and I'll tell the jury to disregard. (Brown) Disregard. Thank you. (Judge) Thank you. (End of side bar conference) (Judge) We're back on the record. I'm going to strike that testimony, direct the jury to disregard. One of the rulings the court's made early on as to all witnesses is that opinions previously rendered in deposition are limited to those things they had in hand when they made those opinions. And it's designed, under the rules of our court, to make sure that at some point in time we stop the

discovery process and we put the trial on. So everyone is given a chance to conduct depositions, hear opinions. They are examined on that so that there are no large surprises come trial and we can proceed with evidence. In this regard, because I don't believe this - - these particular x rays were in Dr. Sperber's possession at the time he rendered those opinions, he can't now add to that, to his opinion.

CTp369 lines 1-3: (Brown) And you claimed that Dr. Bender's records have disappeared; is that correct, Miss Mitchell? (Mitchell) That is absolutely correct.
CTp496 lines 15-28: (Kaplan) You never did then receive your records from Dr. McCracken? (Mitchell) No. (Kaplan) And for that reason, you made an inquiry to the board regarding these records that were - - that weren't released? (Mitchell) Yes, I did. (Kaplan) Did you also make an inquiry to the board regarding Dr.McReynolds? (Mitchell) Yes, I did. (Kaplan) And what was the reason for that? (Mitchell) Well, because I had requested all of his records as well too and he did not release the computerized estimate that he had sent to me of all the ...
CTp497 lines 11-19: (Mitchell) Um, I wanted another copy of that because I beleived that there were only three crowns and a few fillings, and it was lot less that what has shown up in his records. He's got - - (Kaplan) Did you - - (Mitchell) - - 12 teeth in his records. (Brown) Objection. Move to strike. Hearsay. (Judge) That portion will be stricken.
CTp499 lines 1-12: (Kaplan) So for that reason, for - - these lack of records from Dr. Olmstead, that was the reason you made an inquiry to the board? (Mitchell) Yeah. Because the - - I - - I wanted the chart notes. Those chart notes I thought would have stood behind everything I've

had to say, and they're just gone.
CTp1085 lines 21-28: (Brown) Now, as I understand your testimony just now, are you accusing Dr. Kohani of not releasing x rays to you? (Mitchell) I have no idea what happened to those x rays. (Brown) Are you accusing my law firm and our associate attorney of refusing to release x rays to you? (Mitchell) Not of refusing. No one - - no one responded to my multiple requests.

CTp583-584 lines 8-10, 22-28, 1-4: (Brown) Did you have any duties or responsibilities for preparing or delivering temporary crowns? (Sacrenty) Yes.
Line 22-27: (Brown) What - - how is a temporary crown prepared or made in Dr. Shain's office during this time period? What would you do? (Sacrenty) Well, you take an alginate impression. (Brown) An alginate is what, Miss Sacrenty? (Sacrenty) It's a - - a temporary impression material. (Brown) Is this before or after the teeth to be crowned are prepared?
Pg 584 Line 1-4, 20-28(Sacrenty) This is before. So you have the shape of the tooth before the doctor prepares it... (Brown) And what instruments or what procedures would you follow to adjust these temporary crowns? (Sacrenty) You would have the patient bite on a carbon-like paper to see - - with the temporary in their mouth to see if they're biting on an area that's high. (Brown) Now - - and then will you take the temporary crown and place it in the patient's mouth after the adjustments? (Sacrenty) Yes.
Pg 585 lines 1-3: (Brown) And check the - - check the occlusion with articulating paper again, if necessary? (Sacrenty) Yes.
Pg 595 lines 8-19: (Kaplan) ... Any problems in making the crowns? (Sacrenty) No. (Kaplan) Do you even remember as of August 13th, 1998, making the temporary crowns with

respect to Miss Mitchell? (Sacrenty) Yes. (Kaplan) which crown do you remember making? (Sacrenty) The one on #30, the lower right. (Kaplan) And you had no recollection of whether or not you made the temporary crowns for 4 and 5? (Sacrenty) No.

CTp601 lines 6-27: (Kaplan) Miss Sacrenty, is there any licensing that is required for the work that you're describing? (Brown) Objection, your honor. Beyond the scope. Relevance. (Judge) Over ruled. He can ask her if there is licensing required. (Sacrenty) Yes. (Kaplan) Who is the licensing authority, if you know? (Sacrenty) The California Dental Board. (Kaplan) In 1998, were you so licensed to do the work that you're describing, fabricating and delivering crowns? (Brown) Objection, your honor. (Judge) For reasons, Counsel, on relevancy in this particular matter and based on your expert's standard of care, that line of inquiry is irrelevant. And I gave you reasons at side bar. It's improper to raise those issues before the jury without having a request at side bar. Sustained.

CTp612-613 lines 28, & 1-16: (Kaplan) Do you ever make a final occlusion check before discharging a patient? (Sacrenty) Not always. (Kaplan) But - - there have been times that you do? (Sacrenty) No. (Kaplan) Well, that's inconsistent. "Not always" to me implies sometimes. Is it - - I'm not sure if I understand your response. What do you mean by "not always"? (Sacrenty) Sometimes. (Kaplan) Sometimes you do make the final occlusion check? (Sacrenty) (Nods head). (Kaplan) You don't know one way or the other, do you, whether you made the final occlusal check for Miss Mitchell before she was discharged when the temporary crowns are placed; is that correct?

(Sacrenty) I don't recall.

CTp869 lines 3-18: (Kaplan) ...Denise Sacrenty would make the temporary crowns; is that correct, sir? (Dr. Shain) That is correct. Yes, sir. (Kaplan) And after she makes the temporary crowns or prepares the temporary crowns, what is your role in the process?
(Dr. Shain) From time to time, I will make sure that Denise is doing what is expected of her. And by that, I mean, this is a girl who has worked as a - - an RDA, a registered dental assistant, for eight years or longer. But - - most times I would be comfortable leaving Denise Sacrenty to make the temporary crowns and adjust them....
Lines 24-26: And Denise was an excellent RDA and knew exactly what to do regarding making of temporary crowns.

CTp943 lines 15-28: (Kaplan) Your honor, on rebuttal, I have - - Dr. Sperber is out of town. I had shceduled him for the morning the first thing on rebuttal. (Judge) That was improper, Counsel. I told you we would be finishing at 4:15. If you mean the morning Thursday morning, I cannot accommodate you, and I won't. I've got five trials I am dealing with at 8:30 tomorrow morning. And I need to make sure I deal with them. This is completer news tome, Mr. Kaplan. You should have advised me of it yesterday. So that is denied. I'm not going with the case into Thursday morning. You all gave me estimates...

CTp971 lines 9-15, **972**, **973**: (Kaplan) There are two things that came out that I'd like to ask if I can question Dr. Shain on. In one instance, he referred to Denise Sacrenty as his registered dietitian - - registered dental assistant for eight years. I - - I believe that might open the door to the licensing, whether or not she was licensed at the time. And

I'd like to ask him about that.
972 lines 7-28: (Brown) ... it just seems to me that if we get into this issue, particularly since no expert has testified, that we're going to be spendeing extended time, which would require me to bring up the fact that she was a registered dental assistant. She just wasn't licensed. Just like if I haven't paid my bar dues, I'm still an attorney; I'm just not registered, if you will, to do it. So the objection is Evidence Code 352, your honor. (Judge) Well, response on that. (Kaplan) I think the defendant opened the door on Denise Sacrenty, the dental assistant, by indicating or perhaps even misleading the jury that - - that she was a registered dental assistant. And that, to me, creates a higher standard than was actually the case. If she - - and, in fact, your honor, she had not been a licensed registered dental assistant since 1985. So that was like 13 years before the treatment of Ms. Mitchell. We have evidence to show that her license lapsed in 1985, and she never renewed it for another 13 years after that. So it's not just an...
Pg 973 lines 1-28: .... isolated situation. It goes beyond that, I think. (Judge) Okay. Well, let's back up. This is the first time I've heard about a 13 year lapse. The reference earlier was that she simply had not paid her dues. And based on that, I made earlier rulings that have directly affected the time period by which we've had witnesses testify, including that particular nurse herself - - hygienist. And on top of which now, if I were to open this up, I see a considerable problem in addressing how much time we're going to be spending on this and whether I am going to have address some kind of a separate instruction to the jury as to its value on the evidence which brings us back to the key issue here. Although it may be interesting that she wasn't licensed, without getting into a 402 hearing as to the nature of her not being licensed and what impact it would

have on the quality of her work, it doesn't remove the key issue, which is Dr. Sperber never addressed that as being a factor that went into his opinion that Dr. Shain fell below the standard of care by allowing, one, an unlicensed registered nurse - - correction - - hygenist/assistant to engage in prepping of the crown and the placement of the crown or the - - finishing off the work; and , two, what his obligation is to a patient in that regard. So it's pure speculation as to its value on the key issue of falling below the standard of care in this case.

(2)

No. 03-794

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE

In The

Supreme Court of the United States

NANCY MITCHELL,

Petitioner,

v.

GREGORY SHAIN, D.D.S.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENT'S BRIEF IN OPPOSITION

HUGH MCCABE, ESQ.
Counsel of Record
NEIL, DYMOTT, PERKINS,
BROWN & FRANK
1010 Second Avenue, Suite 2500
San Diego, California 92101
(619) 238-1712
Attorneys for Respondent,
Gregory Shain, D.D.S.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED

Whether the rulings and application of California State law made by the California State Appellate Court in its unpublished opinion regarding perceived instructional and procedural errors during the San Diego County, California, Superior Court trial rise to the level of a violation of Petitioner's constitutional rights.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING REVIEW	3
I. THE DECISION OF THE STATE APPELLATE COURT WAS CORRECT AND CONSISTENT WITH CALIFORNIA DECISIONAL LAW	3
II. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO NEGLIGENCE PER SE UNDER CALIFORNIA LAW	4
III. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.30	4
IV. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.06	5
V. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTIONS 6.35 AND 6.36	6
VI. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO CALIFORNIA HEALTH & SAFETY CODE SECTION 1795.20	7
VII. THIS COURT IS NOT THE PROPER FORUM TO RAISE A DE NOVO CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL	8

TABLE OF CONTENTS – Continued

Page

VIII. MITCHELL HAS FAILED TO SET FORTH A CONSTITUTIONAL BASIS FOR REVIEW BY THIS COURT 11

IX. CONCLUSION 12

APPENDIX
TABLE OF CONTENTS

45 C.F.R. § 164.534(a) ..... App. 1

California Code of Civil Procedure Section 128(a)(3) .. App. 1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 12

Braxton v. U.S., 500 U.S. 344 (1991) 2

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 11

Cottle v. Superior Court, 3 Cal.App.4th 1367 (1992) 10

Daum v. SpineCare Medical Group, Inc., 52 Cal.App.4th 1285 (1997) 4

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 3

Gryger v. Burke, 334 U.S. 728 (1948) 11

Hale v. Venuto, 137 Cal.App.3d 910 (1982) 6

Jones v. Dutra Construction Co., 57 Cal.App.4th 871 (1988) 7

Jones v. Moore, 80 Cal.App.4th 557 (2000) 10

Labor Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 2, 3

Lawless v. Calaway, 24 Cal.2d 81 (1944) 5

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 2

Matthews v. Eldridge, 424 U.S. 319 (1976) 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 11

Nicholson v. Rushen, 767 F.2d 1426 (CA9 1985) 8

Norgart v. Upjohn Co., 21 Cal.4th 383 (1999) 10

TABLE OF AUTHORITIES – Continued

Page

Null v. City of Los Angeles, 206 Cal.App.2d 1528 (1988) 9

Soule v. General Motors Corp., 8 Cal.4th 548 (1994) 6

Taylor v. Dickel, 293 F.3d 427 (CA8 2002) 9

Watson v. Moss, 619 F.2d 775 (CA8 1980) 8

Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 11

FEDERAL REGULATIONS

Health Insurance Portability and Accountability Act

45 C.F.R. Parts 160 and 164 8

45 C.F.R. Section 164.534(a) 8

CALIFORNIA STATUTES

California Health and Safety Code Section 1795.20 7

California Code of Civil Procedure Section 128(a)(3) 10

CALIFORNIA JURY INSTRUCTIONS, BAJI (8TH ED.)

BAJI No. 2.03 9

BAJI No. 2.40 5

BAJI No. 6.06 ..... 5, 6

BAJI No. 6.30 ..... 4, 5

BAJI No. 6.35 ..... 6, 7

BAJI No. 6.36 6,7

TABLE OF AUTHORITIES – Continued

Page

TEXT

9 Witkin, Cal. Proc. 4th (1997) 8

SUPREME COURT RULE

Rule 10 2

STATEMENT OF THE CASE

Petitioner Nancy Mitchell ("Mitchell") underwent substantial dental treatment with Respondent Gregory Shain, DDS ("Dr. Shain"), and his office from July through September 15, 1998. On September 16, 1998, Mitchell informed Dr. Shain that she planned to treat with another dentist. In November, 1999, Mitchell filed a dental malpractice claim in the San Diego County, California, Superior Court ("Superior Court"), alleging professional negligence and lack of informed consent. Trial took place in February, 2001, and resulted in a jury verdict in favor of Dr. Shain and against Mitchell on February 20, 2001. Judgment was entered in favor of Dr. Shain on March 2, 2001. Mitchell filed a Motion for New Trial, which was denied by telephonic ruling on April 19, 2001, and on May 31, 2001, Mitchell filed a Notice of Appeal with the California State Appellate Court ("State Appellate Court"). (Pet. Pages 7-9) On April 7, 2003, the State Appellate Court rejected Mitchell's arguments of instructional and procedural error and affirmed the Superior Court judgment in an unpublished opinion, D035601. (Pet. App. Pages 1-18) On April 22, 2003, Mitchell filed a Petition for Rehearing with the State Appellate Court, which was denied on May 1, 2003. (Pet. App. Page 19) On May 19, 2003, Mitchell filed a Petition for Review with the California State Supreme Court ("State Supreme Court"), which was denied on June 25, 2003. (Pet. App. Page 20) The Remittitur was issued on July 1, 2003. (Pet. App. Page 21) Mitchell timely filed the Petition for Writ of Certiorari ("Petition") on September 22, 2003.

SUMMARY OF ARGUMENT

The attempted thrust of Mitchell's Petition appears to be that the ruling on the instructional and procedural errors raised by Mitchell in the State Appellate Court (1) constitutes a deprivation of her liberty rights and due process rights under the 14th Amendment to the United States Constitution, (2) violates equal protection laws, and (3) abridges her rights under the 1st Amendment to the United States Constitution. Notwithstanding her attempt to frame an argument in constitutional terms, Mitchell essentially has requested that this Court re-examine the evidence presented during the Superior Court trial.

Dr. Shain maintains that review by this Court is not necessary as none of the constitutional issues set forth by Mitchell in the Petition were raised in, let alone decided by, the Superior Court or the State Appellate Court. As this Court stated in *Braxton v. U.S.*, 500 U.S. 344 (1991), "[A] principal purpose for which we use our certiorari jurisdiction, . . . is to resolve conflicts among the Circuit courts of appeals and state courts concerning the meaning of provisions of federal law." [*Braxton*, *supra*, at 347] "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'". [*Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923)] "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. "Granting of the writ would not be warranted merely to review the evidence or inferences

drawn from it". [*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938)]

Mitchell's Petition has raised no conflicts among Federal and State Court decisions and has nothing to do with the resolution of principles of "importance to the public", as required by *Labor Board*, *supra*, at 502. Mitchell's Petition merely seeks to correct what she envisions as the misapplication of California law by the State Appellate Court. Accordingly, this Court is requested to deny Mitchell's Petition. Review should also be denied because the opinion below was issued by the State Appellate Court, which is not the Court of last resort in California.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE STATE APPELLATE COURT WAS CORRECT AND CONSISTENT WITH CALIFORNIA DECISIONAL LAW

The crux of Mitchell's Petition concerns the various errors she alleges were committed in the Superior Court and the State Appellate Court. The State Appellate Court opinion correctly stated the material facts of the Superior Court case and addressed all issues raised by Mitchell's instant Petition. The State Appellate Court opinion concisely set forth the applicable California law raised by the issues presented to it for review and the decision soundly rested on the matters raised and briefed by the parties.

II. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO NEGLIGENCE PER SE UNDER CALIFORNIA LAW

The State Appellate Court correctly decided the issues relating to negligence per se under the guidelines of California decisional law by carefully and clearly applying the directions mandated in *Daum v. SpineCare Medical Group, Inc.*, 52 Cal.App.4th 1285 (1997). Based on the issues presented to the State Appellate Court for review, that Court appropriately found that the Superior Court did not commit error by preventing Mitchell from establishing a negligence per se theory of liability through the introduction of evidence regarding the expired license of Dr. Shain's dental assistant. (Mitchell concedes that Dr. Shain's assistant was granted "summary judgment for her liability to [Mitchell] on September 7, 2000" (Pet. Page 7) and that the "assistant's liability was demurred out [o]n May 11, 2000" (Pet. Page 13); although Mitchell incorporates "other authorities" (Pet. App. Pages 24-26) into her argument on Pages 12 and 13, she acknowledges on Page 11 that such "authorities" were not introduced during the Superior Court trial) The reasoning applied by the State Appellate Court to the negligence per se issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

III. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.30

The State Appellate Court correctly decided the issues relating to the propriety of jury instruction pursuant to California Jury Instructions, BAJI (8th ed.) BAJI No. 6.30

(Pet. App. Page 33). The State Appellate Court outlined and correctly adopted the well-established guidelines set forth in *Lawless v. Calaway*, 24 Cal.2d 81 (1944) in determining that the common knowledge exception was inapplicable to the facts of the Superior Court case and that instruction pursuant to BAJI 6.30 was warranted. Moreover, the State Appellate Court appropriately found that because the Superior Court did not err in preventing Mitchell from attempting to establish negligence based on the status of Dr. Shain's assistant's license, that status did not undermine the need for instruction pursuant to BAJI No. 6.30. Finally, the State Appellate Court correctly ruled that instruction under BAJI No. 2.40 (Pet. App. Page 30) allowed the jury to use its common sense in determining the authenticity of Dr. Shain's photographs, notwithstanding the additional instruction pursuant to BAJI No. 6.30. [Despite inclusion in her argument (Pet. Page 20), the State Appellate Court was not asked to and did not address the propriety of BAJI No. 2.04 (Pet. App. Page 29) and BAJI No. 2.02 (Pet. App. Page 29)] The reasoning applied by the State Appellate Court to the BAJI No. 6.30 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

(Dr. Shain notes that the latter part of Section V of the State Appellate Court opinion (Pet. App. Pages 9-12) references BAJI No. 6.06 instead of BAJI No. 6.30)

IV. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.06

The State Appellate Court correctly decided the issues relating to the refusal by the Superior Court to give

California Jury Instructions, BAJI (8th ed.) BAJI No. 6.06 (Pet. App. Page 31). [Despite inclusion in her argument (Pet. Page 21), the State Appellate Court was not asked to and did not address the propriety of BAJI No. 6.11 (Pet. App. Pages 31-32)] Based on the testimony by Mitchell's expert, coupled with the arguments presented by both counsel at the time of closing argument, it was apparent to the State Appellate Court that both sides accepted Dr. Shain's responsibility for his assistant's treatment of Mitchell. More importantly, the State Appellate Court found that the jury was not misled by the Superior Court's decision not to give the requested instruction. Carefully following the dictates of *Soule v. General Motors Corp.*, 8 Cal.4th 548 (1994), the State Appellate Court properly concluded that Mitchell failed to demonstrate any prejudice by the failure of the Superior Court to give the requested instruction. The reasoning applied by the State Appellate Court to the BAJI No. 6.06 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

V. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTIONS 6.35 AND 6.36

The State Appellate Court correctly decided the issues relating to the propriety of instruction pursuant to California Jury Instructions, BAJI (8th ed.) BAJI No. 6.35 (Pet. App. Pages 33-34) and BAJI No. 6.36 (Pet. App. Page 35) and the appropriateness of conditional *res ipsa loquitur* instruction in professional negligence matters. The State Appellate Court closely followed the guidelines set forth in *Hale v. Venuto*, 137 Cal.App.3d 910 (1982). The

State Appellate Court accurately ruled, after thoughtful review of the trial testimony presented in the case, that Mitchell failed to establish the first condition, injury in absence of negligence, necessary to warrant conditional res ipsa loquitur instruction. Accordingly, the State Appellate Court correctly found that the Superior Court acted properly in refusing Mitchell's request for such instruction. The reasoning applied by the State Appellate Court to the BAJI No. 6.35 and BAJI No. 6.36 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

VI. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO CALIFORNIA HEALTH & SAFETY CODE SECTION 1795.20

The State Appellate Court correctly decided the issues relating to the propriety of Mitchell's constitutional challenge to California *Health and Safety Code* Section 1795.20 (Pet. App. Page 28), as it was raised for the first time on her appeal to that Court. In following the dictates of *Jones v. Dutra Construction Co.*, 57 Cal.App.4th 871 (1988), and because Dr. Shain had no opportunity to defend the constitutionality of the statute during the Superior Court trial, the State Appellate Court correctly ruled that Mitchell could not challenge the statute for the first time on appeal. The reasoning applied by the State Appellate Court was sound, consistent with California law, and does not require review by this Court.

Notwithstanding the foregoing, it appears that Mitchell now argues that California *Health and Safety Code* Section 1795.20 is inconsistent with certain sections of the *Health Insurance Portability and Accountability Act*

("HIPAA") (Pet. App. Pages 27-28), 45 C.F.R. Parts 160 and 164. Her argument is flawed, as compliance by covered health care providers with HIPAA requirements was not mandated until April 14, 2003. [45 C.F.R. Section 164.534(a); Resp. App. 1] Although Mitchell relies on 9 Witkin, Cal. Proc. 4th (1997) Appeal, Section 956, p. 1001 (Pet. App. Page 29), which provides that a "decision correct when rendered will, . . . , lose its force as a precedent if a later statute changes the rule", she has completely misinterpreted the intention of the section. While a case may lose its force as *precedent* after a change in the law, the case would not necessarily be reversed just because of such change. Unless the new law as written is meant to apply retroactively, it will have no impact on previously decided cases. While HIPAA may indeed change the way health records are maintained in the future, Mitchell has provided no authority that its provisions were meant to apply retroactively. Because the Superior Court trial and the State Appellate Court opinion were decided prior to the effective date of HIPAA, Mitchell's request for retroactive application of the provisions of HIPAA to the issues raised in the Superior Court case is improper. This Court is respectfully requested to deny the Petition.

VII. THIS COURT IS NOT THE PROPER FORUM TO RAISE A DE NOVO CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Mitchell claims (Pet. Pages 27-30) that she lost the Superior Court case due to ineffective assistance of counsel. It is axiomatic that "[g]enerally, a plaintiff in a civil case has no right to effective assistance of counsel." [*Nicholson v. Rushen*, 767 F.2d 1426, 1427 (CA9 1985); *Watson v. Moss*, 619 F.2d 775, 776 (CA8 1980)] The proper

remedy in such a situation is to bring a malpractice claim against the prior attorney. [*Taylor v. Dickel*, 293 F.3d 427, 431 (CA8 2002)] Mitchell acknowledges (Pet. Page 7) that she has filed a malpractice action against her former attorney. Accordingly, any claim of ineffective assistance of counsel is subject to adjudication in that venue.

Notwithstanding the foregoing, and in claiming ineffective assistance of counsel, Mitchell revisits issues addressed by the State Appellate Court regarding (1) the propriety of BAJI No. 2.03 (Pet. App. Page 29), (2) the Superior Court decision to exclude certain expert testimony, and (3) the Superior Court decision regarding rebuttal testimony. The State Appellate Court correctly decided those issues in its opinion. In addressing the propriety of instruction pursuant to California Jury Instructions, BAJI (8th ed.) No. 2.03, the State Appellate Court applied the holding in *Null v. City of Los Angeles*, 206 Cal.App.2d 1528 (1988), and correctly decided that because neither party offered the instruction at the time of trial, the Superior Court was under no duty to instruct on its own motion. More importantly, and as the State Appellate Court appropriately found, any error committed in failing to give instruction under BAJI No. 2.03 would not support reversal of the judgment in favor of Dr. Shain. The reasoning applied by the State Appellate Court to the BAJI No. 2.03 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

The State Appellate Court properly decided the issues relating to the Superior Court decision to exclude certain expert testimony. The Superior Court reviewed the changes made to the deposition of Mitchell's expert and found that they did not add to or alter the essence of the

opinions disclosed at the time of the deposition. At the time of the Superior Court trial, Mitchell's expert acknowledged that x-rays submitted to him on the stand were not considered as a basis for his deposition opinions and withdrew his trial testimony in that regard. The Superior Court instructed the jury to disregard any testimony regarding those x-rays. The State Appellate Court appropriately applied the well-settled doctrine of invited error as set forth in *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999) and the guidelines contained in *Jones v. Moore*, 80 Cal.App.4th 557 (2000) by upholding the Superior Court's correct decision to exclude such testimony. The reasoning applied by the State Appellate Court to the issues relating to the Superior Court decision to exclude certain expert testimony was sound, consistent with California law, and does not require review by this Court.

The State Appellate Court correctly decided the issues relating to the Superior Court decision regarding rebuttal testimony by Mitchell's expert. The State Appellate Court applied the mandates of *Code of Civil Procedure* Section 128(a)(3) (Resp. App. 1) and the ruling in *Cottle v. Superior Court*, 3 Cal.App.4th 1367 (1992) and correctly determined that the Superior Court was well within its discretion in limiting the evidentiary portion of the trial. The reasoning applied by the State Appellate Court to the issues relating to the Superior Court decision regarding rebuttal testimony by Mitchell's expert was sound, consistent with California law, and does require review by this Court.

VIII. MITCHELL HAS FAILED TO SET FORTH A CONSTITUTIONAL BASIS FOR REVIEW BY THIS COURT

Mitchell's Petition attempts to characterize the State Appellate Court ruling on the instructional and procedural errors raised in that venue as a deprivation of her liberty rights and due process rights under the 14th Amendment to the United States Constitution, a violation of equal protection laws, and an abridgment of her rights under the 1st Amendment to the United States Constitution. Mitchell's characterization is flawed. The Court "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question". [*Gryger v. Burke*, 334 U.S. 728, 731 (1948)] In *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937), this Court pointed out that the "Constitution of the United States does not guarantee that the decision of state courts shall be free from error [citation omitted]; or require that pronouncements shall be consistent". In light of the foregoing, the perceived errors raised by Mitchell do not constitute a violation of constitutional guarantees and there are no issues in her petition which merit review by this Court.

Notwithstanding the foregoing, Dr. Shain submits that due process requirements were met in each venue of Mitchell's case. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'". [*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)] "The fundamental requirement of due process is

the opportunity to be heard 'at a meaningful time and in a meaningful manner'". [*Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)]

Mitchell's Petition (Pet. Pages 7-9) is replete with admissions establishing she received due process of law and the opportunity to be heard. Mitchell acknowledges that she filed a malpractice lawsuit against Dr. Shain on November 8, 1999, and in November of 2000, retained an attorney to represent her. She concedes that the Superior Court trial began on February 6, 2001, and the case was submitted to the jury on February 15, 2001, with a verdict in Dr. Shain's favor rendered on February 20, 2001. Mitchell admits that she filed a motion for a new trial and, after it was denied, a motion for reconsideration, which was also denied. Finally, Mitchell acquiesces that thereafter, she was able to avail herself of her due process rights by filing an appeal with the State Appellate Court and request review by the State Supreme Court. Unfortunately, she was unhappy with the ultimate outcome of the process. There was no denial of due process in this matter and there are no issues which merit review by this Court.

IX. CONCLUSION

The State Appellate Court was meticulous and thorough in its decision of this case, which addressed the material facts and issues of the case in a well-reasoned decision consistent with California law. The State Supreme Court, the Court of last resort in California, appropriately denied review of the State Appellate Court decision. Mitchell has failed to raise constitutional issues that merit review by this Court and has requested nothing

more than re-examination of the evidence presented and not presented during the Superior Court trial. Dr. Shain respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HUGH A. MCCABE
NEIL, DYMOTT, PERKINS,
BROWN & FRANK
A Professional Corporation
1010 Second Avenue, Suite 2500
San Diego, California 92101
(619) 238-1712
Attorneys for Respondent
Gregory Shain, D.D.S.

APPENDIX

45 C.F.R. § 164.534(a):

"(a) Health care providers. A covered health care provider must comply with the applicable requirements of this subpart no later than April 14, 2003."

California Code of Civil Procedure Section 128(a)(3):

"128.1(a) Every court shall have the power to do all of the following: . . . (3) To provide for the orderly conduct of proceedings before it, or its officers."